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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MICHELE MARCHESE,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

JUL 8 1968

APPELLEES' BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

JUL 2 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELE MARCHESE,
Appellant,
vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

APPELLEES' BRIEF

I

STATEMENT OF THE CASE

A. Statement of Facts.

As stated by appellant Marchese, in his opening brief on the instant appeal, the District Court made an order, on December 5, 1967 (entered on December 6) (C. T. 10), ^{1/} denying his latest motion to vacate sentence under 28 U. S. C. 2255. The Order was grounded upon the District Court's determination that

1/ "C. T. " refers to Clerk's Transcript.

the files and records of the case conclusively show that Marchese was entitled to no relief. It was made "without prejudice to the right of petitioner to file application for writ of habeas corpus". The "2255" motion was presented on a mimeographed form entitled "Motion, Pursuant to Sec. 2255 of Title 28, United States Code by a Person in Federal Custody (Ancillary to No. 26762 C.D.)" (C. T. 2).

To summarize, the "2255" motion raised, or purported to raise, an issue pertaining to the use, by federal narcotics agents, of a hidden transmitting device upon the person of an undercover informant, which sent its signals to a receiver to which the agents listened.

The history of appellant's various applications for post-conviction relief in the District Court, and the multitude of proceedings at the appellate level, both in this Honorable Court and in the Supreme Court of the United States, are in substance summarized at page five of the aforementioned mimeographed form of the "2255" motion (C. T. 2). The history of such proceedings, as of February 10, 1965, are also summarized in this Honorable Court's Opinion in United States v. Marchese, 341 F.2d 782, 784 (9th Cir. 1965).

B. Question Presented.

Whether the District Court Erred in Denying the Instant Motion Under 28 U.S.C. 2255, Where the Files and Records of

the Case Conclusively Show Petitioner is Entitled to No Relief.

II

ARGUMENT

WHERE, AS IN THE INSTANT CASE, THE FILES AND RECORDS OF THE CASE SHOW CONCLUSIVELY THAT THE PETITIONER IS ENTITLED TO NO RELIEF, THE DISTRICT COURT DID NOT ERR IN SUMMARILY DENYING HIS MOTION UNDER TITLE 28 UNITED STATES CODE, SECTION 2255.

The essence of Appellant's Opening Brief is that, notwithstanding his multitudinous applications for post-conviction relief, and appellate hearings and attempts at re-hearings thereon, and petitions for certiorari to the United States Supreme Court, he is entitled to be discharged from the custody of the Attorney General of the United States because a hidden transmitting device was carried upon the person of an undercover informant while he conversed with Mr. Marchese. (Counsel make various assertions, aliunde and de hors the record, concerning appellant's good prison behavior, and speculate as to Judge Clarke's views concerning this protracted case, but these are not matters which form a proper or permissible basis for a ruling upon a "2255" motion. United States v. Marchese, supra, 341 F.2d at 787-789, 801.)

The "hidden transmitter" issue was previously raised, and most recently disposed of by this Honorable Court, in its opinion in Marchese v. United States, 378 F.2d 16 (9th Cir. 1967)

There it was said, 378 F.2d at 17:

"On February 10, 1965, this court referred to the legal maneuvers of appellants [Marchese and his accomplice, one Del Bono] to avoid imprisonment (341 F.2d 782), after their conviction in 1958 by a jury (and the affirmance of their convictions in 1959 by this court) of selling two pounds of heroin. Their petitions for a writ of certiorari were denied by the Supreme Court. 360 U. S. 930, 79 S.Ct. 1447, 3 L. Ed.2d 1543 (1959) and 360 U. S. 938, 79 S.Ct. 1463, 3 L. Ed.2d 1550 (1959). This court described the matter as 'extraordinary', on their second appeal. The appellants' freedom on bail as of this date is even more extraordinary; and a sad commentary on how delays can be achieved that destroy any faith in the certainty of punishment for crime."

In the opinion, this Court went on to say, 378 F.2d at 17:

"No new matters, not heretofore passed upon, are raised on this appeal. We were asked in oral argument to anticipate what the Supreme Court of the United States might say or do in *Katz v. United States*, 9 Cir. , 369 F.2d 130, certiorari granted March 13, 1967, and further to anticipate that whatever that Court might say or do would be held retroactive in effect. This we decline to do. We prefer to follow, as we must, the last views expressed

by a majority of the Supreme Court in *Osborn v. United States*, 385 U. S. 323, 87 S. Ct. 429, 17 L. Ed. 2d 394 (1966). Here, as in *Osborn*, supra, the electronic device was used by and with the consent of one party to a conversation to make an accurate record thereof. The tape recording did not involve 'the surreptitious surveillance by an outsider.' "

The Federal cases cited by appellant in his instant brief, in support of the proposition that the use of the concealed transmitting device in question violated his constitutional rights, all involved "bugging", to-wit, the placement of an eavesdropping device either outside or inside a place where the accused was speaking. To be sure, the "physical penetration", and related "tests", are no longer controlling. But this is not a "bugging" case; it merely involves the use of a corroborative listening device -- a device employed to insure to the accuracy of reports and recollections of an undercover agent.

Such was recognized and ruled upon by this Honorable Court in its aforementioned opinion reported at 378 F. 2d 16.

In short, the use of corroborative listening devices, attached to the persons of informants, is not violative of the confidant's constitutional rights, and even in the highly unlikely event that it were ever so held, it is extremely doubtful that any decision so holding would be applied retroactively.

See: Linkletter v. Walker, 381 U.S. 618,
85 S. Ct. 1731, 14 L.Ed.2d 601 (1965);
Johnson v. New Jersey, 384 U.S. 719,
86 S. Ct. 1772, 16 L.Ed.2d 882 (1966);
Lee v. Wilson, 363 F.2d 824 (9th Cir. 1966);
Lester v. Wilson, 363 F.2d 824 (9th Cir. 1966).

Since the "hidden transmitter" issue relative to the Marchese prosecution has thus been ruled upon, the District Court was amply justified in summarily denying the subject "2255" motion.

Title 28, U. S. C. , Section 2255;
Sanders v. United States, 373 U.S. 1, 15,
83 S. Ct. 1068, 10 L.Ed.2d 148 (1963);
Marchese v. United States, 378 F.2d 16, 17-18
(9th Cir. 1967);
United States v. Marchese, 341 F.2d 782, 784-785
(9th Cir. 1965).

The statute and the cases above cited all hold that the District Court is in no respect required to hear a motion such as the one in question, and may summarily deny it, where the issues sought to be raised have been litigated on previous occasions.

With respect to appellant's assertions regarding the remedy of habeas corpus, suffice it to say that they are not germane to any action of the trial court herein, and are not proper subjects for discussion in the instant matter.

III

CONCLUSION

The District Court did not err, and its Order denying appellant's instant "2255" motion should be affirmed.

Respectfully submitted,

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~~No. 21,465~~

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARTHA G. WHITFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Order of the United States District
Court for the Eastern District of California
Refusing to Correct or Reduce Sentence

BRIEF FOR THE APPELLANT

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FILED

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I

<p>The lower court abused its discretion and committed reversible error in denying appellant's motion to vacate, reduce, or correct her sentence under Rule 35 of Federal Rules of Criminal Procedure where such denial was made on the erroneous grounds that appellant was not entitled to probation after a plea of not guilty and conviction unless she first admitted her alleged guilt or that she "had done something wrong" prior to passing on her application for probation and sentencing ..</p>	8
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No. 21,465

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MARTHA G. WHITFIELD,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

**On Appeal from the Order of the United States District
Court for the Eastern District of California
Refusing to Correct or Reduce Sentence**

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court denied Appellant's motion to reduce, and correct its sentence on her conviction under the net worth theory of two counts of her indictment under 26 U.S.C. 7201 for willful attempt to evade and defeat income taxes. (R. 137.)

JURISDICTION

This is an appeal by the defendant, Martha G. Whitfield, from the refusal of the District Court to reduce and correct a sentence of one year given the

defendant by said District Court on two counts under 26 U.S.C. Section 7201 for willfully attempting to evade income taxes. Appellant was convicted under the dubious "net worth method." The sentences were to run concurrently. Jurisdiction in this case was conferred by 47 Statutes, 904 as amended; Rules 32 and 35 Federal Rules of Criminal Procedure; Eighth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. 1291; 18 U.S.C. 3651; and 18 U.S.C. 3231.

QUESTIONS PRESENTED

1. Did the lower court abuse its discretion and commit reversible error in denying Appellant's motion to vacate, reduce, or correct her sentence under Rule 35 of Federal Rules of Criminal Procedure where such denial was made on the erroneous ground that Appellant was not entitled to probation after a plea of not guilty and conviction unless she first admitted her alleged guilt or that she "had done something wrong" prior to passing on her application for probation and sentencing?

2. Did the District Court err in refusing to consider evidence dehors the record as shown by affidavits filed by the defendant on a motion to correct and reduce sentence showing that the defendant's husband was making seven times the net income claimed by the Government during the seven year period prior to the defendant's husband's death and that other witnesses for the Government had given false testimony?

STATUTES INVOLVED

Internal Revenue Code of 1954, Section 7201; Rules 32 and 35 Federal Rules of Criminal Procedure; Eighth and Fourteenth Amendments to the Constitution of the United States; 18 U.S.C. 3651; 18 U.S.C. 3231; and 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an appeal from the order of the District Court dated December 18, 1967 under Rules 35, F.R.C.P.* refusing to grant Appellant's motion to reduce and correct her sentence of conviction for willfully attempting to evade her income taxes for the year 1958 in the amount of \$32,527.44 and 1959 in the amount of \$8,995.45. (Probation Report dated December 1, 1965, Exhibit 29, page 1.) After Appellant's conviction and before sentence Appellant had asked the District Court for probation. The District Court refused to grant probation *or even to consider probation* on the ground that the Appellant had plead not guilty, stood trial, still maintained her innocence, and desired to appeal the District Court's sentence to this Court and would not admit she "had done something wrong" prior to her sentence by the District Court.

Appellant based her motion to reduce sentence and correct her sentence on the ground that the District Court erroneously abused its discretion in refusing to

*"The court may correct a sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for herein for reduction of sentence . . ." Rule 35, F.R.C.P.

grant Appellant probation because after her conviction and before her sentence she would not "confess" to the probation officer and the District Court that she was guilty, perjured herself at the trial, thus, waiving her constitutional right to appeal to this Court and eventually to the Supreme Court of the United States.

Appellant's conviction in the District Court was obtained under the dubious and oft criticised "net worth theory" regarding which we later cite but one of the many criticisms of this method of obtaining convictions in income tax violations.

A brief statement of the facts leading up to the defendant's conviction is here briefly set forth. Appellant and her husband moved to Delano, California in 1940. (R.T. 293, lines 23-25.) They purchased a site and installed underground storage tanks and a bulk plant for use in the operation of a wholesale distributorship of gas and oil for Associated Oil Company. (R.T. 294-295.) Defendant's husband was the wholesale distributor for such large customers as DiGiorgio Farms, Roma Wine Company, and eleven service stations in the Delano area. About a year later they built their home on this property, and in 1947 they discontinued the oil distribution business and built a 14-unit motel on a portion of the premises. (R.T. 295, lines 15-25.) In April of 1948, about two or three weeks after these first motel units were opened, Mr. Whitfield died. (R.T. 301, lines 6-11.) In 1951 or 1952 Appellant converted the bulk plant to 8 additional units. (R.T. 296, lines 2-25.) In 1954 or 1955 Appel-

lant added 8 more units to the motel, resulting in a total of 30 units. (R.T. 297.) All of these units were built pursuant to the original plans dated February 11, 1947. (R.T. 299.) In 1953 Appellant developed additional plans for a swimming pool and lounge. (R.T. 300.) Appellant was advised by friends of her husband not to build the swimming pool and lounge at this time and so she built the final 8 units instead. (R.T. 297, lines 9-14.) The swimming pool and lounge were eventually built during 1958 and 1959. (R.T. 310, lines 3-5.) All of the above described motel facilities were operated as the Hal Mar Motel.

On February 10, 1961, Appellant was contacted by special agents of the Intelligence Division of the Internal Revenue Service at the Hal Mar Motel in Delano, California.

On May 22, 1961 these special agents interviewed Appellant and questioned her concerning the currency of \$109,000.00 which she had reported in a delinquent Federal estate tax return. (R.T. 79, lines 19-20 and R.T. 81, lines 16-18.)

On March 31, 1964, an indictment was filed in two counts charging that on or about April 7, 1959 and on or about April 8, 1960 Appellant willfully and knowingly attempted to evade and defeat income taxes for the calendar years 1958 and 1959, respectively, by filing false and fraudulent income tax returns. (R. 2.)

The Government contended at the trial that the Appellant's husband made less than \$3,000.00 a year or a total of \$20,529.82 for the seven year period after

arriving in Delano and prior to his death in 1948 and, therefore, could not have accumulated this hoard of \$109,000.00.

Appellant was convicted and sentenced December 6, 1965 after being denied probation. She then appealed to this Court which affirmed her sentence. Appellant then moved to reduce and correct her sentence, which the District Court denied on December 18, 1967. (R.T. Dec. 18, 1967, page 32.)

On Appellant's motion to correct and reduce sentence heard December 18, 1967 Appellant introduced the affidavit of the former district supervisor of the Associated Oil Company for whom the Appellant's deceased husband worked, that her deceased husband had been making at least \$20,000.00 a year net during the seven years before his death. We quote from the affidavit of this former supervisor of the Associated Oil Company:

"Mr. Whitfield had one of our most profitable distributorships and I would estimate his earnings after deducting costs of operations were in excess of Twenty Thousand Dollars, (\$20,000.00).

Seven years prior to his death, 1940 to 1948, were some of the most profitable years in the oil business in Kern County and in the Fresno District. In most of this period, the oil industry was under rationing and regulations of the Federal Price Control, and, therefore, all of our prices were very stable and there was no price cutting." (Thomas Murray's affidavit, Wholesale Supervisor for Associated Oil Company from 1940 to 1959, Clerk's Transcript of Dec. 18, 1967 page 26.)

The Government contends that there can be no evidence dehors the record on a motion to correct and reduce sentence under Rule 35 Federal Rules of Criminal Procedure. However, as will be shown in our argument, this question of whether evidence dehors the record may be considered on a motion under Rule 35 to correct and reduce a sentence as still open in the Supreme Court of the United States and, further, all of the Circuit Courts of Appeal agree that such evidence dehors the record may come in to show that where a Government prosecutor willfully introduced unfounded and immaterial testimony to secure a conviction that a motion to correct and reduce sentence under Rule 35 Federal Rules of Criminal Procedure should be granted.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred and committed reversible error in refusing to consider probation because the defendant plead not guilty, stood trial under her constitutional rights, and would not admit she had at least "done something wrong" before the District Judge ruled on her application for probation and sentenced her, thus, waiving her right to appeal to this Court and eventually to the United States Supreme Court.

2. The District Court misapplied the "Net Worth Method" determining income tax violations.

ARGUMENT

I

THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO VACATE, REDUCE, OR CORRECT HER SENTENCE UNDER RULE 35 OF FEDERAL RULES OF CRIMINAL PROCEDURE WHERE SUCH DENIAL WAS MADE ON THE ERRONEOUS GROUNDS THAT APPELLANT WAS NOT ENTITLED TO PROBATION AFTER A PLEA OF NOT GUILTY AND CONVICTION UNLESS SHE FIRST ADMITTED HER ALLEGED GUILT OR THAT SHE "HAD DONE SOMETHING WRONG" PRIOR TO PASSING ON HER APPLICATION FOR PROBATION AND SENTENCING.

1. Refusal of the District Court to Grant Probation May Be Reversed on Appeal Where as Here There Was an Abuse of Discretion in Refusing to Grant Probation. Arbitrary or Capricious Action in Denying Probation by the District Judge Should Be Reversed on Appeal.

"order denying petition for suspension of sentence in connection with application for admission to probation is reviewable on single question of abuse of discretion." (Syllabus.) (*Burr v. U.S.*, 86 Fed. 2d 502, C.C.A. 7th Cir. 1936.)

"The action of the Court in refusing to grant probation is not reviewable on appeal except possibly for arbitrary or capricious action on the part of the District Judge which amounts to an abuse of discretion." (*U.S. v. White*, 147 Fed. 2d 603, C.C.A. 9th Cir. 1945.)

2. Congress Intended that Probation Was to Be Used to Give a Defendant Another Chance Where She Had a Good Previous Record.

"Probation, like parole, is 'intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity for clemency.'" (Italics ours.) (*Toy-*

saburo v. Korematsu v. U.S., 319 U.S. 432, 434, 63 S. Ct. 1124, 1126, 87 L.E. 1947.)

“Most important function to be performed by criminal law and its integral component, the prison system is rehabilitation of offenders.” (Syllabus.) (*U.S. v. Benson*, 332 Fed. 2d 288, C.C.A. 2d Cir. 1964.)

“Probation or suspension of sentence is concerned with rehabilitation, not with determining guilt.” (*Bernam v. U.S.*, 302 U.S. 211, 58 S. Ct. 164.)

3. **Here the Defendant Was a First Offender, Had No Convictions or Arrests Until Her Conviction in This Case and Had a Good Reputation in Her Community.**

Assuming that the defendant was guilty, she is now over sixty-five, was a hard working widow, and *had never been arrested or convicted of any offense during her sixty-five years of active life.*

We quote from the report of the probation officer—which although not in the record, as yet, was read into the record without objection at the hearing on the plaintiff’s motion to reduce and correct her sentence.

“This is a 64-year-old *first offender*. She has a reputation of being a competent and astute businesswoman in her community of Delano. She is an industrious person and performs many of the menial tasks to save labor.” (R.T. Dec. 18, 1967, lines 9-13.)

4. **The District Judge, the United States Attorney, and the Probation Officer All Erroneously Held that the Defendant Was Not Entitled to Probation Because She Had Plead Not Guilty, Stood Trial, and Still Maintained Her Innocence Prior to Her Application for Probation and Sentence.**

The statement of the United States Attorney at plaintiff's motion to reduce and correct sentence of December 18, 1967 clearly brings out this erroneous view of the law.

"The sentence should not be reduced for the further reason that the defendant *persists in mouthing the same fabrication that she did at the time of her trial*. There has not been one single sign of rehabilitation shown by the defendant." (R.T. Dec. 18, 1967, page 6, lines 3-7.)

The probation officer recommended against probation solely on the basis that the plaintiff plead not guilty, went to trial, and at her hearing before the probation officer refused to say she committed perjury in previously denying her alleged guilt. We quote again from this report read into the record in open court without objection:

"*Defendant continues to maintain that her husband left her cash of approximately \$109,000.00 at the time of his death and that she is innocent of the current violation*. In view of the defendant's attitude toward her conviction we can see no rehabilitation purpose to probationary supervision." (R.T. Dec. 18, 1967, page 5, lines 18-24.)

The District Judge clearly relied upon and considered the probation officer's illegally based report. Finally the District Judge also followed this same illegal concept of the probation law and clearly abused

his discretion in refusing to consider probation because she plead not guilty, stood trial, continued to maintain her innocence, would not admit "she had done anything wrong," and insisted on her right to appeal to this Court. We quote the words of the District Judge:

"The Court: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here, and of course, that the probation officer's point, *that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate*, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and *if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.*" (R.T. Dec. 18, 1967, page 12, lines 13-21.)

In other words the trial judge in stating "if she won't tell the truth to the probation officer or the court" and admit "*she had done something wrong*" prior to passing on her application for probation and sentence clearly abused his discretion and committed reversible error. It is impossible to distinguish this case from the words of the District Judge in *U.S. v. Wiley* from which we quote:

"The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered.* (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation, such a rule should not be followed." (*U.S. v. Wiley*, 278 Fed. 2d 500, C.C.A. 7th Cir. 1960.)

Clearly the action of the District Judge in refusing to consider probation for the defendant because she stood on her constitutional rights and plead not guilty, stood trial, and thereafter refused to change her plea to either the probation officer or the Court or admit that she "had done something wrong," thus, destroying her right to appeal to this Court was a clear abuse of discretion on the part of the District Judge.

5. Denial of Defendant's Motion to Correct and Reduce Sentence Under Rule 35 Federal Rules of Criminal Procedure Is an Appealable Order.

Appellant had moved to correct and reduce her sentence, asking probation, under Rule 35 Federal Rules of Criminal Procedure on the grounds that the District Court had refused to grant her probation because she wouldn't admit her guilt, or at least that "she had done something wrong" before the District Court passed on her application for probation and sentenced her. (R.T. Dec. 18, 1967, page 121, lines 13-21.) This Court's denial of Appellant's motion under Rule 35 was an appealable order. (*Barton v. U.S.*, 375 U.S. 29, 84 S. Ct. 21, 11 L.E. 2d 1; *Heflin v. U.S.*, 358 U.S. 415, 79 S. Ct. 451, 3 L.E. 2d 403; *Yates v. U.S.*, 355 U.S. 66, 78 S. Ct. 128, 2 L.E. 2d 95.)

6. This Court Had the Power to and Should Vacate the Sentence and Remand the Case to the District Judge with Instruction that the Plaintiff's Refusal to Admit Her Alleged Guilt Before the District Court Had Passed on Her Application for Probation Is Not a Bar to Probation.

"District Court's order judgment vacated and remanded for further proceedings not inconsistent with this opinion. The sentence is vacated and the case remanded to the District Court for

further proceedings not inconsistent with this opinion." (*Thomas v. U.S.*, 368 Fed. 2d 941, C.C.A. 5th Cir. 1966.)

This Court should reverse the order of the District Court and remand the case to the District Court with clear instructions that Appellant has a constitutional and statutory right to ask for probation without first either changing her plea to guilty, "admitting that she had done something wrong," or waiving her right to appeal her conviction to this Court.

II

THE EVIDENCE PRESENTED BY THE GOVERNMENT AND ITS ERRONEOUS CONCEPTION OF THE NET WORTH METHOD AND ITS ERRONEOUS USE OF WITNESSES TO SUSTAIN THAT METHOD CONSTITUTED A DEPRIVAL OF APPELLANT'S CONSTITUTIONAL RIGHTS.

1. The Conviction and Sentence of Appellant Was Obtained Under the Dubious and Doubtful "Net Worth Method."

The conviction of Appellant was obtained by a skillful, experienced prosecutor against a young attorney under the "Net Worth Method." Men of long service with the Internal Revenue Bureau generally come to admit that many innocent persons have been illegally convicted under this method.

"It has been my experience in and out of the Internal Revenue Service that the net worth method can be used to harm the innocent, as well as to unmask the guilty. It is my feeling that more taxpayers have been over-taxed through the net worth method than through any other audit procedure or technicality of law. The method is a dangerous one, and many incorrect deficiencies

are assessed.” (The Journal of Taxation, September, 1961, by Fred R. Bohlen, Edited by Harry Graham Balter, LL.B., page 159.)

2. **Under the “Net Worth Method” the Government Must Conclusively Prove Lack of Assets at the Beginning of the Period. Here the Government Utterly Failed to Do This.**

It is a fundamental and unanimous rule of the Courts that the Government must prove beyond all reasonable doubt that a taxpayer had no other assets at the beginning of the period used in the net worth method.

“Essential proof of no other assets is the cornerstone of the evidence of the Government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt. The judgment is reversed.” (*U.S. v. Fenwick*, 177 Fed. 2d 488, 490, 492, 7th Cir. 1946.)

Fairchild v. U.S., 240 Fed. 2d 944, 5th Cir. 1957.

At Appellant’s motion to correct and reduce sentence under Rule 35 Federal Rules of Criminal Procedure, Appellant submitted an affidavit of the supervisor of the Associated Oil Company that defendant’s husband was making \$20,000.00 a year during the period 1941 to 1948 from his gasoline and oil business.

This contention of Appellant that her husband had given her a cash hoard of \$109,000.00 was confirmed by the testimony of Hollis Roberts, one of the largest individual ranchers in Kern County and the Delano area, where Appellant resided after Mr. Whitfield’s death, and that in 1948, shortly after Appellant’s husband’s death, Appellant had offered to loan him

\$100,000.00 in cash (R.T. 492) and in 1957 actually loaned him \$50,000.00 cash in the form of fifty \$1,000.00 packages of currency.

The Government failed to produce the income tax reports of Appellant's husband for the years 1941 to 1948, but in lieu thereof introduced a calculation prepared by the Internal Revenue Service (Plaintiff's Exhibit No. 4) based on the total income taxes paid during the years 1940 to 1948.

However, on cross-examination on this Exhibit, Agent Jack L. Stewart, when asked if he knew what the actual gross receipts of Harold Whitfield were during the seven-year period, replied that he did not know what the actual gross receipts actually were and that the gross receipts in any one of those years could have been \$50,000.00 to \$100,000.00 (R.T. 132, line 5) and admitted that he had not taken into account the heavy depreciation of the Appellant's husband's abandonment of the huge wholesale gasoline complex after eight years of use. Clearly the Government legally failed to refute the undisputed testimony of Appellant, Mr. Roberts and the Supervisor of the Associated Oil Company.

"Wherever net worth is sought to be applied to determine taxable income, cogency of government's proof depends upon effective negation of reasonable explanations by taxpayer inconsistent with guilt, and such refutation may fail when government does not track down relevant leads furnished by taxpayer." (Syllabus.) (*Fairchild v. U.S.*, 240 Fed. 2d 944, 5th Cir. 1957.)

"When government relies upon circumstances of increased net worth and expenditures in ex-

cess of reported income to establish income tax evasion, basic net worth must be established." (Syllabus.) (*U.S. v. Fenwick*, 177 Fed. 2d 489, 7th Cir. 1949.)

"In prosecution for income tax evasion, government has burden of proof, and that burden never shifts to defendant." (*U.S. v. Fenwick*, 177 Fed. 2d 489, 7th Cir. 1949.)

3. The Government Must Prove the Taxpayer's Excess Income for the Year He Was Indicted for Failure to Pay His Income Tax. This the Government Completely Failed to Do.

It is clear under the authorities that even in the dubious and inaccurate "Net Worth Method" of proving income tax violations the Government must prove the income of the taxpayer for the year it is claimed the taxpayer failed to report his income. This is clear from all the decisions of which we quote but two:

"To prove fraud, however, the Government was bound to establish by clear and convincing evidence that such increases as were reflected by its *computations*, represented then *current, taxable income*. * * *" (*Holland v. U.S.*, 348 U.S. 121, 1963; 75 S. Ct. 127.)

"To prove taxpayer's fraud in attempting to evade tax, in order to avoid effect of limitations, under the net worth method, government was bound to establish by clear and convincing evidence that such increases in net worth as were reflected by its computations, represented then *current, taxable income*, and by the same degree of proof to show that such increases were not attributable to amounts earned in prior years,

as claimed by the taxpayer." (Syllabus.) (*Fairchild v. U.S.*, 240 Fed. 2d 944, 5th Cir. 1957.)

This the Government failed to do.

In the instant case, the Government contended that the Appellant failed to report on her 1958 income tax the sum of \$32,627.44, net in 1958 from a small motel in the little town of Delano, California. This was over two years after U.S. Highway 99, the major highway through Delano, had been moved over ten (10) blocks west of Appellant's motel. Earl W. Taylor, the District Traffic Engineer for District VI of the California Division of Highways (R.T. 271, line 24 and 272, line 16), testified that the official date of completion of the freeway was August 3, 1956, and that the freeway was actually opened on June 22, 1956 (R.T. 274, line 9 and 275, line 11), and the results of those counts were in part indicated on Defendant's Exhibit C. The figures on Defendant's Exhibit C show that highway traffic dropped 80 per cent after U.S. Highway 99 by-passed Appellant's motel.

To further support his ridiculous and false contention that Appellant made \$32,627.44 in 1958, net from her small motel two years after the highway moved over one-half mile away, the Government attorney introduced the testimony of three maids and a Mr. Peterson with respect to motel occupancy. Mr. Peterson testified that he stayed at the Hal-Mar Motel for approximately one month during 1954 (R.T. 499, lines 14-19) and that at that time the motel was approximately half full during the week

and it appeared to be completely full on weekends. (R.T. 500, lines 12-18.) It is difficult to understand what, if any, inference the jury could draw from the testimony of Mr. Peterson as to occupancy during one month *in 1954* with respect to occupancy during 1958 and 1959, particularly *when it is undisputed that in 1956 the traffic on the highway on which the motel was located was diverted to a newly constructed freeway to by-pass the City of Delano over one-half mile away* and the traffic count in the area of the motel decreased by approximately 80 per cent thereafter.

A second witness called by Appellee with respect to occupancy of the motel was Anna May Smith, who was employed by Appellant *as a maid from January through November of 1955*, with respect to occupancy in 1958 and 1959. (R.T. 202, lines 10-21 and 204, lines 19-24.) The weight of her testimony as to occupancy of the motel in 1955 with respect to occupancy in 1958 and 1959 is subject to the same criticism raised with respect to Mr. Peterson's testimony, in that *it deals solely with a period prior to the Delano freeway by-pass in 1956*. The above evidence, not being connected up with the tax years in question, 1958 and 1959, cannot be given any weight in arriving at a judgment in this case.

The remaining two witnesses who testified with respect to occupancy of the motel were employed by Appellant during 1958. The first of these two witnesses was Shirley Collins, who did maid work for Appellant at the Hal-Mar Motel from July through

December of 1958, and from August through December of 1959. Mrs. Collins testified that during part of the summer practically all of the thirty units of the motel were occupied but that during the fall the occupancy slacked off to about half. (R.T. 216, lines 12-25.)

The final witness to testify with respect to occupancy of the motel was Consuela C. Ramirez, who contradicted Shirley Collins and also worked as a maid at the Hal-Mar Motel only during the month of October, 1958. (R.T. 220, line 21 to 221, line 6.) Her testimony was that about half of the units were occupied on weekdays and practically all of the units were occupied on weekends during the month of October, 1958. (R.T. 221, lines 10-21.)

The introduction of such remote, erroneous, and immaterial evidence clearly shows that the clever method used by Government counsel was simply an attempt to hoodwink the jury and the Court and as such, as will be later shown, constituted a violation of the due process clause of the Constitution.

To meet this illegal and immaterial evidence at the time of Appellant's motion to correct and reduce sentence on December 18, 1967, Appellant introduced the affidavit of Charles Franklin, a certified public accountant and partner in the nationally known firm of Giffen, Hills & Carruth, who is a recognized motel accountant, and who stayed at the Appellant's motel in August and April of 1958, and April and October of 1959 (R.T. 461, line 4 and 462, line 5), both in the years of alleged income tax evasion and over a

year after U.S. Highway 99 had by-passed Appellant's motel, who in his affidavit stated:

"From the conditions relating to occupancy at the Hal-Mar Motel in the years 1958 and 1959, as I observed them as a customer at the said motel, it is my considered opinion and belief that Mrs. Martha Whitfield, as motel operator, would be barely breaking even, if not losing money, on her motel operations during that period." (Charles H. Franklin's affidavit, Certified Public Accountant, Giffen, Hills & Carruth.) (Clerk's Transcript, page 26.)

We call the Court's attention to certain untrue, irrelevant, and unbelievable testimony offered by the Government in the person of Arlene Lee Smith, who was called as a Government witness, who had been a teller in the First National Bank, later the United California Bank, in Delano, from 1952 to 1963.

She testified on direct examination to the effect that Martha Whitfield, during those years, first came into her bank *in 1952* and called at her teller's window two or three times a week, and would bring in a small amount of checks and cash and ask for large currency, 100's, 50's, and some 20's which she would then take out of the bank and occasionally, not often, make a deposit. (R.T. 513, lines 1-25.) She was asked this question: "She would bring in \$300 to \$500 each time (R.T. 514, line 19), weekly, over a period of 11 years?" Mrs. Smith's answer was, "Yes." (R.T. 515, lines 14-19.)

On cross-examination she stated, "She would come in 2 or 3 times weekly; she would call at my window

and get \$900 or \$1,500 a week in currency.” (R.T. 517, lines 14-19.) She admitted that \$900 a week for 52 weeks would total \$46,800 for the year; and at \$1,500 a week, would total \$75,000; and over a ten-year period at two to three times a week, would total \$468,000 and \$750,000, respectively. (R.T. 519, lines 1-21.)

Of course, such testimony is absurd and unbelievable. Furthermore, by her own testimony she never entered a single deposit for Martha Whitfield until 1959 or 1960, as is shown by Appellant’s Exhibit Q and Appellant’s Exhibit R, each of which had over 200 entries.

The testimony of Arlene Lee Smith was refuted by Molly Gregory, who was also a teller at the United California Bank in Delano for over 13 years (R.T. 476, line 19), who was called by the Appellant, and whose name or initials, M.G., were posted in most places in Appellant’s Exhibit Q and Appellant’s Exhibit R (R.T. 479, line 14), sometimes two and three times a day, who completely disputed the practices described by Mrs. Arlene Lee Smith.

4. Evidence Dehors the Record Should Be Considered Under Rule 35, Federal Rules of Criminal Procedure.

The decisions of the circuit courts are not unanimous on whether evidence dehors the record can be reviewed in a motion under Rule 35, Federal Rules of Criminal Procedure. However, the Supreme Court says this question is still open and undecided.

“Whether Rule 35 covers the broader field of collateral attack, where a hearing to consider

matters dehors the record we do not here determine.” (*Heflin v. U.S.*, 358 U.S. 415, 422, 79 S. Ct. 451 at 453, footnote 7, 1963; 3 L.E. 2d 407.)

We feel that equity demands that competent evidence outside the record should be considered and that the affidavit of the Supervisor of the Associated Oil Company and the testimony of Mr. Franklin, the Certified Public Accountant, that Appellant’s motel made nothing in 1958 and 1959 should be considered just as the courts allow evidence dehors the record to show that a defendant’s plea of guilty was obtained by promises of immunity.

5. Deliberate Suppression of Evidence or Use of Untrue Evidence, Deception of the Jury by a Government Prosecutor Constitutes a Violation of Due Process Under Amendment XIV to the Constitution of the United States.

Here the Government prosecutor had used witnesses to testify as to the conditions of Appellant’s motel in 1952 and earlier many years before the year in which she was accused of concealing her income and many years before U.S. Highway 99 by-passed her motel and by testimony of bank tellers who didn’t even handle her deposits. Other immaterial and irrelevant evidence was introduced. Such conduct we submit constituted deprivation of due process under the Constitution of the United States.

“Grounds that have been recognized in the cases for a motion to correct, vacate, or set aside a judgment include the following: double sentence or punishment, coercion into pleading guilty, the use of perjured testimony. The de-

liberate suppression by the prosecution of evidence favorable to the plaintiff may constitute a denial of due process so as to be grounds for the statutory motion." (50.139 Cyc. Fed. Procedure.)

"The requirement of due process cannot be deemed to be satisfied if a state has contrived a conviction through the pretense of a trial which in truth is used as a means of depriving a defendant of liberty through deliberate deception of court and jury." (*Mooney v. Hohan*, 294 U.S. 103, 55 S. Ct. 34 Article 342.)

Dated, Fresno, California,
March 21, 1968.

Respectfully submitted,
LUCIUS POWERS,
CLAUDE L. ROWE,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLAUDE L. ROWE,
Attorney for Appellant.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTHA G. WHITFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
[FORMERLY SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION]

WM. MATTHEW BYRNE, JR.,
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FILED

APR 22 1968

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IN THE UNITED STATES COURT OF APPEALS
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vs.

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Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On March 31, 1965, appellant was indicted in two counts by the Federal Grand Jury for the Southern District of California, Northern Division, for attempt to evade and defeat the payment of tax for the calendar years 1958 and 1959 in violation of Title 26, United States Code, Section 7201 [C.T. 1].^{1/} Following a trial by jury before the Honorable Myron D. Crocker, United States District Judge, from October 26, 1965, to November 2, 1965, appellant Martha G. Whitfield was found guilty of both counts.

^{1/} "C. T. " refers to Clerk's Transcript.

Appellant was convicted and sentenced on December 6, 1965, to the custody of the Attorney General for one year on each count, the sentences to run concurrently [C.T. 9].

Following an appeal to this Court, on September 11, 1967, the judgment of the District Court was affirmed [Whitfield v. United States, 383 F.2d 142 (9th Cir. 1967)]. The mandate of this Court was spread on November 6, 1967 [C.T. 12].

On November 8, 1967, appellant filed a Notice of Motion to Correct and Reduce Sentence [C.T. 18], and on November 22, 1967, appellant filed a Statement of Defendant's Motion with supporting affidavits [C.T. 26].

On December 18, 1967, a hearing was held on the motion to reduce [Reporter's Transcript], which was followed by the filing on January 8, 1968, of an Order Denying Defendant's Motion to Correct and Reduce Sentence [C.T. 66].

On January 15, 1968, appellant filed a timely Notice of Appeal [C.T. 67].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Rule 35 of the Federal Rules of Criminal Procedure.

This Court has jurisdiction to review the final decision pursuant to Title 28, United States Code, Sections 1291 and 1294.



STATUTE INVOLVED

Rule 35 of the Federal Rules of Criminal Procedure provides:

"The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. As amended Feb. 28, 1966, eff. July 1, 1966."

III

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in denying appellant's motion for a reduction of sentence.

2. Whether appellant may attack pre-sentence

3.

proceedings in a Rule 35 motion, and whether the trial court had jurisdiction of appellant's claim of an invalid conviction.

IV

STATEMENT OF FACTS

The facts of appellant's crimes are set out in detail in the appellee's brief filed in the direct appeal from conviction [No. 21465].

A brief synopsis of the facts is found in this Court's opinion, 383 F.2d 142, 144-45 (9th Cir. 1967) as follows:

* * * *

"The records of her bank accounts were irreconcilable, and, after her first interview with the revenue agent, she destroyed motel reservation cards which might have either supported or undermined her contention that her business enterprise could not have produced the amounts of unreported income claimed by the Government to have been earned in 1958 and 1959. In the beginning, the appellant told the investigating agent that there had been no large amounts of cash on her premises during the period from 1948 through 1955 and that, if there had been any cash whatsoever on hand during that period, the amount would have been no more than nominal. She stated that her only inheritance was

from her husband, and she expressed her opinion that it was "unsafe" to keep large amounts of cash on hand. Afterward, when she knew that the investigation was underway and had consulted with her accountant, she first revealed her contention as to the existence of a cash hoard, stated that her deceased father had made large monetary gifts to her during his lifetime, and remarked that her husband had been distrustful of banks. In refutation, the Government offered proof that appellant's father had been supported by his county's relief fund throughout the period from 1946 to 1958, that he had no assets in those years beyond \$125, and that, in a 1947 application for welfare benefits, he had represented that his income was \$60 per month. Moreover, the Government proved that appellant visited her bank two or three times each week, exchanged small checks and currency of small denominations for \$20, \$50, and \$100 bills, and seldom made a bank deposit. A bank teller testified that the appellant, as she made these exchanges, departed from the bank each week with between \$900 and \$1500 in bills of the larger denominations. Opposing appellant's representation that her deceased husband had distrusted banks, the Government presented bank statements revealing that he did in fact maintain bank accounts during his lifetime and that the deposited

amount in one of his savings accounts had reached \$10,000."

This Court, in its earlier opinion stated at page 145:

"In submitting the case to the jury and in fixing punishment, he (the trial court judge) was apparently convinced, as we are convinced, that the appellant undertook to cheat her Government and that the jury ascertained the truth." (Emphasis added).

At the hearing which took place on December 18, 1967, on the Rule 35 motion, the District Court made the following comments:

"THE COURT: What would probation serve in this particular case; what purpose would it serve to grant probation?" [R. T. 9].^{2/}

"THE COURT: My point is that that is what the probation officer had in mind in his report, that there is nothing that he can do to help Mrs. Whitfield. This isn't a case for rehabilitation, which is what the probation officer would be working on, so I think that that is what he had in mind.

"The matter of sentence is left up to me as to

^{2/} "R. T. " refers to Reporter's Transcript.

whether to give her ten years or \$20,000 fine and I just thought I was real lenient in only making it one year." [R. T. 11].

"THE COURT: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that's the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer or to the court, then there's no basis for probation.

"That's why I think your argument should be limited to no sentence or a jail sentence. I don't think probation is indicated at all. I don't see what the probation officer could do to help her. You haven't told me." [R. T. 12].

"THE COURT: She wasn't denied probation on that ground. She was denied probation on the basis that there wasn't anything the probation officer could do to help her. There wasn't anything he could do.

* * * *

"THE COURT: The probation officer just reached the conclusion that there wasn't anything he could do to help her when he said that probation should not be granted and you haven't told me anything

the probation officer could do to help Mrs. Whitfield in this case." [R. T. 13].

V

ARGUMENT

A. THERE WAS NO ABUSE OF DISCRETION
 IN THE DENIAL OF APPELLANT'S
 MOTION TO REDUCE HER SENTENCE.

Appellant appears to take the position that Judge Crocker abused his discretion by refusing to grant probation because appellant would not confess. Not only is there no authority cited for such a proposition, but the record is devoid of such reasoning on the Court's part. As the statement of facts, above, shows, Judge Crocker felt that probationary supervision would be time and energy wasted on appellant's behalf.

" . . . [A]n appellate court has no authority either to reduce or modify a sentence or order the trial judge to do it on an appeal from a denial of a motion under Rule 35. Flores v. United States, 9 Cir., 1956, 238 F.2d 758; Beren v. United States, 9 Cir., 1953, 202 F.2d 440; Kimbaugh v. United States, 5 Cir., 1952, 199 F.2d 453." Bryson v. United States, 265 F.2d 9, 14 (9th Cir. 1959), cert. den. 355 U.S. 817.

B. APPELLANT CANNOT ATTACK PRE-
SENTENCE PROCEEDINGS IN A RULE 35
MOTION AND THE TRIAL COURT HAD
NO JURISDICTION TO ENTERTAIN AN
ATTACK ON THE JUDGMENT ITSELF.

Appellant, in her motion, filed affidavits which violate the hearsay, best-evidence, and opinion rules of evidence. Nevertheless, the affidavits were used in an attempt to attack the judgment of conviction. Such matters were improper in a Rule 35 motion.

" . . . Rule 35 . . . presupposes a valid conviction, Smith v. United States, 9 Cir. 287 F.2d 270. Its only function is to permit correction of an illegal sentence, not to reexamine other proceedings prior to the imposition of sentence. Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 7 L.Ed. 2d 417. It follows that Rule 35 is not available for setting aside the sentences . . . on the ground that he was not validly convicted on those counts." Redfield v. United States, 315 F.2d 76, 81 (9th Cir.1963).

Not only was the attack on the conviction improper as part of a Rule 35 motion, there was no jurisdiction in the trial court to consider the conviction. Title 28, United States Code, Section 2255 provides authority for collateral attack on a conviction of a person in custody. Section 2255 is available only to attack a sentence under which a prisoner is in custody. Heflin v.

United States, 358 U.S. 415 (1959); Migdal v. United States, 298 F.2d 513 (9th Cir. 1961). Since appellant was not, and is not, in custody, the trial court could not consider the conviction itself.

VI.

CONCLUSION

For the above stated reasons the final decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
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JANUARY 1998

22682

No. 21,465

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Court for the Eastern District of California
Refusing to Correct or Reduce Sentence**

REPLY BRIEF FOR THE APPELLANT

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FILED

MAY 17 1968

WM. B. LUCK, CLERK

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No. 21,465

IN THE

United States Court of Appeals

For the Ninth Circuit

MARTHA G. WHITFIELD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Order of the United States District
Court for the Eastern District of California
Refusing to Correct or Reduce Sentence

REPLY BRIEF FOR THE APPELLANT

ARGUMENT

I

THE DECISION OF THIS COURT IN WHITFIELD v. UNITED STATES, 383 FED. 2d 142 (1967) HOLDING THAT INTERNAL REVENUE AGENTS NEED NOT WARN TAXPAYERS THEY WERE ENTITLED TO COUNSEL BEFORE INTERROGATION AND UPON WHICH THE TRIAL JUDGE BASED HIS DECISIONS REFUSING TO CORRECT AND REDUCE DEFENDANT'S SENTENCE WAS OVERRULED BY THE SUPREME COURT OF THE UNITED STATES MAY 6, 1968.

1. The Trial Court in Denying Appellant's Motion to Correct and Reduce Her Sentence Relied on the Decisions of This Court in Whitfield v. United States, 383 Fed. 2d 142 (1967) Holding That an Internal Revenue Agent Need Not Warn the Taxpayer of Her Right to Counsel Before Interrogation.

Both the Government and the Trial Court relied on *Whitfield v. United States*, 383 Fed. 2d 142 (1967) in

making their decision refusing to correct and reduce plaintiff's sentence as the record clearly shows, which case held that the plaintiff need not be advised of her right to counsel.

2. The Internal Revenue Agent Did Not Warn Plaintiff of Her Right to Counsel Before Interrogation.

The Government investigator stated that he read the following statement to defendant (appellant herein) before interrogating her in her motel office.

"A. Well, I told her that according to the federal laws of these United States, 'you cannot be required to furnish any information that may incriminate you in any way' and I told her, 'It is my duty to warn you that in the event that any action is taken against you in a Federal Court that any information or documents you furnish can be used against you in any such proceedings' and then I advised her that she could refuse to answer any or all the questions that I was about to ask her." (R.T. 72, lines 3-11.)

"The Government admits that its agent did not advise appellant of her right to have counsel in attendance during the interrogation * * * failure to include information as to right of counsel affords appellant no basis for relief." (*Whitfield v. U.S.*, 383 Fed. 2d 142, 143 (1967).)

As shown by the testimony and decision above there was no warning that she had the right to counsel given by this agent to this elderly widow, the defendant, before interrogating her alone in her office.

3. The Supreme Court of the United States on May 6th of This Year Held a Revenue Agent Must Warn the Taxpayer of His Right to Counsel Thus Overruling *Whitfield v. United States*, 383 Fed. 2d 142 (1967).

"It is true that 'a routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. * * *" (page 3 of opinion in *Mathis v. United States*, No. 726, October Term, 1967, May 6, 1968.)

"We reject the idea that tax investigators are immune from the *Miranda* requirements for warnings to be given to a person in custody." (*Mathis v. U. S.*, supra.)

Thus holding that both the *Escobedo* and the *Miranda* cases applied to internal revenue agents interrogating taxpayers.

4. The Supreme Court Has Held That *Escobedo* Applies Only to Trials Held After June 22, 1964.

The Supreme Court of the United States has recently held that the *Escobedo* case applies only to trials after June 22, 1964.

"In this case we are called upon to decide whether *Escobedo v. State of Illinois*, 378 U.S. 478, 84a S. Ct. 1758, 12 L.E. 2d 977 (1964) and *Miranda v. State of Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.E. 2d 694 should be applied retroactively. We hold that *Escobedo* affects only those cases in which the trial began after 1964, the date of that decision. We hold that *Miranda*

applies only to cases in which the trial began after the date of our decision one week ago (Sec. 1966)." (*Johnson v. State of New Jersey*, 384 U.S. 723, 86 S. Ct. 1772, 1775 (1966).)

"We held that *Escobedo* affects only those cases in which the trial began after June 22, 1964." (*Johnson v. State of New Jersey*, 384 U.S. 723, 86 S. Ct. 1772 (1966).)

"Because *Escobedo* is to be applied prospectively this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided." (*Johnson v. State of New Jersey*, 384 U.S. 735, 86 S. Ct. 1772, 1781 (1966).)

5. However, Here the Defendant's Trial in This Case Began and Was Finished in 1965.

The defendant's trial in this case was held in 1965 and she was sentenced in 1965, thus making the *Escobedo* case applicable.

"Appellant was sentenced December 6, 1965." (*Whitfield v. United States*, 383 Fed. 2d 142, 144 (1967).)

6. The Fact That Plaintiff Was Not in Custody in This Case When Interrogated Is Immaterial.

Clearly there is no distinction between the plaintiff being in custody and this elderly widow being confronted alone by several revenue agents in her office in her motel as stated above and without advice. The revenue agents demanded and stayed until the defendant produced all of her motel records, which they copied and made notes from and who answered ques-

tions propounded by them without being warned of her right to counsel. Such confrontation and undue influence coupled with their threat she was being investigated criminally as effectively "deprived her of her freedom in a significant way" as being in actual custody and made the reasoning of the *Escobedo* case which we quote applicable to her situation.

"We hold that where an individual is taken into custody or deprived of his *freedom in any significant way* * * * he must be warned of * * * that he has the right to the presence of an attorney and that if he cannot afford an attorney, one will be appointed by him prior to any questioning if he so desires." (*Miranda v. U.S.*, 384 U.S. 436, 86 S. Ct. 1607, 1612 (1966).)

Also see *Johnson v. State of New Jersey*, 384 U.S. 735, 86 S. Ct. 1772, 1781 (1966) where psychology, theatrics, intimidation, show of force, use of threatening expressions on the interrogator's face, show of authority and intimidations that a suspect must answer interrogatories are the same as using force or confinement.

II

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR ON STATING THAT BECAUSE THE DEFENDANT DID NOT PLEAD GUILTY OR AT LEAST ADMIT SHE "HAD DONE SOMETHING WRONG" BEFORE SENTENCE SHE WAS NOT ENTITLED TO PROBATION.

1. **The Trial Judge Denied Probation to This Defendant Because She Did Not Plead Guilty or Admit She Had Done Something Wrong Before Sentence.**

This clearly appears from the statement of the trial judge at page 7 of the Government's Brief. We quote:

"The Court: But my question is, why probation? In other words, if you agree there is no rehabilitation indicated here and, of course, that the probation officer's point, that where she doesn't admit she ever did anything wrong, there isn't anything to rehabilitate, so there isn't anything he can do and, further, probation has to be based upon trust and confidence and if she won't tell the truth to the probation officer to the court, then there's no basis for probation." (Appellee's Brief, page 7). (R.T. 12.)

In other words, the trial judge clearly stated that unless appellant admitted her guilt before sentence she was not legally entitled to probation. This is not a matter of discretion, but is an erroneous statement of the law and is clearly a reversible error.

In other words, the trial judge insisted that appellant would have to abandon her right to appeal to this court by admitting "she had done something wrong" (that is, that she was guilty), before sentence. This would, of course, have destroyed her right

to appeal. Such a position is unheard of, it is clearly erroneous, and constitutes a reversible abuse of discretion.

There is no legal distinction between this case where the trial judge insisted that defendant throw away her constitutional right to appeal to this court by "admitting she had done something wrong" and the case where the trial court refused defendant's probation because the defendant refused to plead guilty and stood trial as was the case in *United States v. Wiley*, 278 Fed. 2d 500. We quote:

"The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered*. (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation, such a rule should not be followed." (*U.S. v. Wiley*, 278 Fed. 2d 500, C.C.A. 7th Cir. 1960.)

The case of *Bryson v. U.S.*, 265 Fed. 2d 9, cited by counsel for appellee, is not in point. The right to probation is part of the sentence and a right given to defendants in criminal cases by law. The trial judge may grant or deny probation as a matter of discretion, but he cannot change the law by adding to the law the erroneous additional provision that no defendant is entitled to probation unless he admits his guilt before sentence, and thus waive his right to appeal to this court. The attempt of the trial judge to add such an illegal condition to an application for probation constitutes an abuse of discretion whether

you consider it a right or a privilege. It is impossible to distinguish the present case where the trial judge insisted that the defendant plead guilty and the case of *U.S. v. Wiley*, 278 Fed. 2d 500, C.C.A. 7th Cir. (1960) where the trial judge held that a defendant must plead guilty and give up his right to a trial or he would forfeit his right to ask for probation. We quote from this case:

“The trial judge announced from the bench that it was the standard policy in his court that once the plaintiff stands trial *probation for such defendant would not be considered.* (Italics ours.) It is contrary to the statute and the rule of Criminal Procedure authorizing probation, such a rule should not be followed.” (*U.S. v. Wiley*, 278 Fed. 2d 500, C.C.A. 7th Cir. 1960.)

To hold that the trial judge had the right to refuse to grant probation solely on the grounds that defendant failed to plead guilty before sentence was an unenforceable privilege would be like saying a trial judge could add to the probation act of Congress a condition that there will be no probation granted when the defendant is a Negro. In the above discussion we assume a valid conviction but an illegal sentence.

2. Counsel for Appellee Is in Error When He States That Appellant Asks This Court of Appeals to Correct or Reduce Defendant's Sentence.

Counsel for appellee at page 8 of Brief for Appellee erroneously states that we are asking *this court* to reduce or modify appellant's sentence.

We are familiar with the law that correcting or reducing a sentence is the province of the *trial judge*. All we request is to ask this court to vacate the sentence of appellant and remand this case to the trial court with instructions that the appellant need not admit her guilt or that she had “done something wrong” before sentence which is only another way of saying she is guilty before she is entitled to probation. We quote from page 13 of our Appellant’s Opening Brief:

“This court should reverse the order of the District Court and remand the case to the District Court with clear instructions that appellant has a constitutional and statutory right to ask for probation without first either changing her plea to guilty, ‘admitting that she had done something wrong,’ or waiving her right to appeal her conviction to this court.” (Page 13, Appellant’s Opening Brief.)

We have only asked that this court *vacate and remand the case to the trial court* with instruction that probation does not depend on an admission of guilt before sentence and that defendant’s refusal to admit her guilt before sentence and before taking her appeal does not give a trial judge the right to deny probation any more than the fact that defendant pleads not guilty and stands trial gives the trial judge the right to deny probation after trial as ruled in the following case:

“District Court’s order judgment vacated and remanded for further proceedings not inconsistent with this opinion. The sentence is vacated

and the case remanded to the District Court for further proceedings not inconsistent with this opinion." (*Thomas v. U.S.*, 368 Fed. 2d 941, C.C.A. 5th Cir. 1966.)

III

APPELLEE'S CONTENTION THAT EVIDENCE DE HORS THE RECORD CANNOT BE CONSIDERED ON A MOTION TO CORRECT OR AMEND SENTENCE UNDER RULE 35 IS WRONG.

Counsel for appellee at page 9 of his brief states that the affidavits filed by defendant may not be considered by the trial judge. That is not the law. The appellant contends that untrue evidence was used by the prosecution at the trial and that the prosecution knew or should have known it was untrue. This was true as stated in Appellant's Opening Brief in the bank teller Shirley Collins' testimony, who testified for the Government and in the calculations of the earnings of defendant's husband by Government witnesses. (R.T. 216; R.T. 519, lines 1-21.) In such a case testimony de hors the record may be introduced in a motion under Rule 35, Federal Rules of Criminal Procedure.

"Grounds that have been recognized in the cases for a motion to correct, vacate, or set aside a judgment include the following: double sentence or punishment, coercion into pleading guilty, the use of perjured testimony. The deliberate suppression by the prosecution of evidence favorable to the plaintiff may constitute a denial of due

process so as to be grounds for the statutory motion." (50.139 Cyc. Fed. Procedure.)

"The requirement for due process cannot be deemed to be satisfied if a state has contrived a conviction through the pretense of a trial which in truth is used as a means of depriving a defendant of liberty through deliberate deception of court and jury." (*Mooney v. Hogan*, 294 U.S. 103, 55 S. Ct. 34, article 342.)

Moreover, the Supreme Court has held that the question of admission of evidence de hors the record in a Rule 35 case is still undecided and open in that court.

"Whether Rule 35 covers the broader field of collateral attack, where a hearing to consider matters de hors the record we do not here determine." (*Heflin v. U.S.*, 358 U.S. 415, 422, 79 S. Ct. 451 at 453, Justice Douglas' footnote 7, 1963, 3 L.E. 2d 407.)

IV

OTHER ERRONEOUS STATEMENTS IN DEFENDANT'S BRIEF COMMENTED UPON.

1. **The Counsel for the Government Erroneously Contends That Defendant Here Cannot Seek Relief Under Rule 35 F.R.C.P. Because She Is Not in Custody.**

In the first place, counsel for the Government's facts are wrong. Defendant was arrested and released on bail. She is clearly "in custody." *Turner v. Wilson*, 49 Ind. 581, 585; *Levy v. Arnsthal*, 10 Grant 641, 648 (Va.).

Secondly, there is no provision in Rule 35, Federal Rules of Criminal Procedure, that defendant must

be in custody to make a motion to correct sentence under Rule 35. Rule 35, Federal Rules of Criminal Procedure, provides that "The Court may correct a sentence at any time."

Finally, the authorities of appellee are not in point as they deal with Section 2255, Title 28 U.S.C.A., not Rule 35, F.R.C.P. The case of *Redfield v. U.S.*, 315 Fed. 2d 2681, is not in point as it dealt with Title 18, Section 2255. We quote:

"Section 2255 may be involved only by those claiming the right to be released." (*Redfield v. U.S.*, 315 Fed. 2d 76, 81.)

Migdol v. U.S., 298 Fed. 2d 513, 515 (1961), cited by appellee, was also not in point since it deals with paragraph 2255, Title 18. We quote:

"It is now well settled that paragraph 2255, Title 18 U.S.C. is available only to attack a sentence under which a prisoner is in custody. *Heflin v. U.S.* 358 U.S. 415; 79 S. Ct. 451; *Miller v. U.S.* 9th Cir., 256 Fed. 2d 501." (*Migdol v. U.S.*, 298 Fed. 2d 513, 515, 1961.)

Neither is *Heflin v. U.S.*, 94 S. Ct. 451, since it also refers to section 2255, Title 18 (*Heflin v. U.S.*, 79 S. Ct. 452, footnote 4).

V

CONCLUSION

It is submitted that the sentence in this case should be vacated and remanded to the trial court on the

following grounds: (1) That the trial court committed reversible error in refusing to consider probation because the defendant would not admit her guilt before sentence and thus waived her right to appeal. (2) That the trial court erroneously refused to consider evidence de hors the record to show untrue testimony was used by the prosecution which they knew or should have known was false, and (3) That defendant was not warned of her constitutional rights to counsel before interrogation by the internal revenue agents.

Dated, Fresno, California,

May 17, 1968.

Respectfully submitted,

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CLAUDE L. ROWE,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellant.

FEB 26 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL DIXON LEWIS,

Appellant,

VS:

UNITED STATES OF AMERICA,

Appellee.

FILED

FEB 11 1969

APPELLEE'S BRIEF

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APPEAL FROM
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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Appellant,

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Text

Mathes and Devitt, Federal Jury Practice and
Instructions, §§8.27, 15.04

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Rule

Federal Rules of Criminal Procedure:

Rule 52(b)

10, 39

N O. 2 2 6 8 3
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL DIXON LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF ISSUES

Appellant's Opening Brief raises the following issues:

1. Was trial counsel appointed for appellant incompetent?
2. Does appellant have standing to assert errors allegedly committed against his codefendant and wife?
3. Was appellant prejudiced by the failure of the Government to present a requested list of witnesses?
4. Was the appellant prejudiced by the testimony of an eyewitness presented in rebuttal rather than in the Government's case-in-chief?
5. Was the appellant prejudiced by the Government's

- request that his codefendant, on cross examination, don a jacket alleged to have been worn by the codefendant during the robbery?
6. Was the search and seizure of the "get-away" automobile illegal so to render the fingerprint obtained therefrom inadmissible?
 7. Were the statements taken from appellant's codefendant the product of an unconstitutional interrogation and, thus, the arrest of appellant illegal?
 8. Was the appellant entitled to representation of counsel during a "photo spread" shown to some of the identifying witnesses?
 9. Was appellant prejudiced by his testimony that he was not advised of his constitutional rights, and, thereafter, no statements made by him were introduced?
 10. Was appellant prejudiced by the jury's hearing that he had been convicted of a misdemeanor?
 11. Were the jury instructions rendered by the court so erroneous and misleading as to destroy appellant's right to have a fair trial?
 12. Was the participation of the court in the trial such as to deprive appellant of a fair trial?
 13. Did the impeachment of the appellant's wife through the use of her own statements made to FBI agents

violate the defendant's constitutional rights?

14. Did the court incorrectly consider deterrence when sentencing the appellant?

II

STATEMENT OF FACTS

On October 27, 1967, the appellant and two other men entered the Manchester and Vermont Branch of the Bank of America. The appellant was dressed in a postal carrier's uniform and carried a pistol (R. T. ^{1/} pp. 97 and 105). Appellant's codefendant William Kier was wearing a noticeable pair of blue tennis shoes and also carried a pistol (R. T. pp. 97 and 104). The third man carried a sawed-off shotgun covered with an empty bread wrapper, and positioned himself at the front door of the bank (R. T. p. 101).

After so entering the bank, it was announced that the bank was being held up. While the appellant covered the interior of the bank with his pistol, William Kier took his mail pouch and emptied the cash drawers (R. T. p. 98). He also placed his pistol at the head of the bank manager to insure his cooperation (R. T. pp. 96 and 212).

During the course of the robbery, the appellant was observed by at least five eyewitnesses: Charmaine A. Brindley

^{1/} Refers to Reporter's Transcript.

(R. T. pp. 93-135); Mary Brown (R. T. pp. 136-151); Wavellyn Calhoun (R. T. pp. 151-161); Ruthie Mae Brown (R. T. 195-209); and Mr. Campbell Thompson (R. T. pp. 209-224).

When Mrs. Ruthie Mae Brown entered the bank through the back door, the appellant pointed his pistol at her and told her to "Get over there" (R. T. p. 197). Mr. Campbell Thompson had just left one of the teller's windows when the appellant told him to "Hold it right where you're at" (R. T. p. 211), and later told him to "Turn around and look the other way" (R. T. p. 214).

During the course of the robbery the Los Angeles Police had been alerted and upon arriving at the scene they burst through the front doors of the bank firing their weapons (R. T. p. 102). In the hail of bullets, the robber with the shotgun was killed instantly (R. T. p. 207). Codefendant William Kier slipped into a side room and later was seen hastily leaving the bank (R. T. p. 571). The appellant, proceeded to leave by the back door of the bank. As he stepped out into the alley he was met by John Cartelli (R. T. p. 164) to whom he said, "Hurry, hurry, man there are some more inside" (R. T. p. 164). The appellant held the door open for Mr. Cartelli, and, thereafter, scampered down the alley to the street where he was confronted by Mr. Edward LeSage. LeSage asked the appellant, "What's going on?" and the appellant replied "I don't know, but I'm getting the hell out of here" (R. T. 238-39). The appellant then entered a blue Corvair automobile and drove away (R. T. p. 239). LeSage was able to observe the letters "FFS" on the license plate (R. T. p. 240). He thereafter gave the

description of the appellant, the automobile, and the license plate letters to an F. B. I. agent (R. T. p. 240).

Mr. Orly A. Leeson, a special agent of the F. B. I. observed a blue Corvair automobile with the letters "FFS" on the license plate parked five blocks away from the bank at approximately 11:50 A. M. (R. T. p. 249). The license plate had been taped over the actual plate (R. T. p. 250). Leeson also observed that a quantity of loose bread was in the back seat of the vehicle (R. T. p. 252).

Subsequently, fingerprints were taken from the automobile and the tape surrounding the license plate. One of the appellant's fingerprints was found on the tape (R. T. pp. 284, 303-304). Furthermore, a postal card found inside the bank bore one of appellant's fingerprints (R. T. pp. 263, 300-303).

Appellant's codefendant William Kier was apprehended a few blocks from the bank (R. T. pp. 226-228). He was then advised of his constitutional rights (C. T. ^{2/} p. 57) and taken down to the Los Angeles Police Department (C. T. p. 57). He was questioned by Sergeant Jack Williams and made statements implicating the appellant (C. T. p. 58).

The appellant was arrested the same night by two F. B. I. agents (R. T. p. 397). The appellant's wife was questioned at a later time and she stated that she had not heard from the appellant during the time that the bank was being robbed (R. T. p. 565).

III

ARGUMENT

Taking the appellant's rather lengthy brief in a broad overview it would seem that it can be divided into three more or less distinct parts.

The first part consisting of subheading "A" is an allegation by appellant that his counsel at trial was incompetent, and, therefore he should be given a new trial with competent counsel. The reader is invited to consider the entire brief and record as substantiating his contentions.

The second part is composed of a series of alleged instances of misconduct directed toward the appellant's codefendant and wife which the appellant asserts seriously infected his case.

The third part consists of alleged errors committed by law enforcement officials, Government counsel and the court directly against the defendant. This part can be broken down into errors which were objected to at trial and those which were not raised.

Appellant would have this Court believe that the various errors are so egregious that the whole trial reeks with misconduct. After reading appellant's brief one could only draw the conclusion that his trial is only matched in legal history by the Star Chamber. This is not the case.

A. TAKING THE RECORD AS A WHOLE
APPELLANT'S TRIAL COUNSEL WAS
NOT INCOMPETENT, AND APPELLANT'S
QUARREL LIES WITH TRIAL STRATEGY
RATHER THAN ADEQUACY OF REPRESENTATION

In answer to the allegations set forth in the first section of Appellant's brief (Subheading "A") the Government would cite several cases dealing with incompetency of counsel, a procedure which appellant neglected to follow.

In Brubaker v. Dickson, 310 F. 2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978, 83 S. Ct. 1110, many of the same allegations raised by appellant were raised. The counsel was appointed, and various allegations of misconduct were made. In summarizing the law on this point this Court stated at 310 F 2d 30, 37:

"This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.

Determining whether the demands of due process were met in such a case as this requires a decision as to whether upon the whole course of the proceedings and in all the attending circumstances there was a denial of fundamental fairness; it is inevitably a

THE HISTORY OF THE CITY OF BOSTON

FROM 1630 TO 1800

The history of the city of Boston, from its first settlement in 1630, to the present time, is a subject of great interest and importance. It is a city which has been the seat of many of the most important events in the history of the United States, and which has played a prominent part in the development of the nation. The city has been the birthplace of many of the great men of the country, and has been the scene of many of the most important events in the history of the world. The history of the city is a subject which has attracted the attention of many writers, and has been the subject of many books and articles. The history of the city is a subject which is of great interest to all who are interested in the history of the United States, and who wish to know more about the city which has been the seat of so many of the most important events in the history of the nation.

question of judgment and degree. "

This Court has also stated in Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967), that grounds for reversal exist only if the appointed counsel's assistance to the defendant was of such a kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice.

See also Pinedo v. United States, 347 F.2d 142 (9th Cir. 1965), cert denied, 382 U.S. 976, 86 S.Ct. 547.

The appellant points out that defense counsel was here appointed by the court and then reaches the absurd conclusion that the Government is estopped from asserting any failure to object to various alleged errors by either that counsel or the appellant. The Government can and will raise the point that the defendant's counsel did fail to pursue some avenues of trial strategy, and will assert that throughout the trial there was never an anguished outcry from the lips of the appellant that he was inadequately represented. Appointed counsel at times have been relieved of their duties for incompetency on motion of the court and/or the defendant. Here no such action was taken by the defendant or court indicating that in fact representation by the appointed defender was capable.

It would seem that appellant's present attorney of record would have conducted the trial in a different manner, but it is submitted by the Government that the basis for this feeling should not be that the appellant was denied due process of law, but that

different lawyers have different ways of trying law suits. In United States v. Pate, 312 F. 2d 161 (7th Cir. 1963), an appellant asserted that his court appointed counsel was so derelict that his trial was rendered a facre and a mockery of justice. The court therein answered his contentions as follows:

"Petitioner lists a number of purported errors of omission and commission in his counsel's conduct of the case. All of these relate to trial strategy or tactics, and involve elements of discretion and judgment on which skilled and experience advocates might honestly disagree, particularly after the event. 312 F. 2d 161, 162."

The Government would submit that after examining the lengthy record of this case, that appellant's quarrel lies not within the bounds of Constitutional Law or misconduct, but in trial strategy. Further, a consideration of the record reflects that the appellant's attorney represented him ably and with fervor.

B. ALLEGED ERRORS NOT RAISED IN THE
TRIAL COURT MAY NOT BE RAISED
FOR THE FIRST TIME ON APPEAL

Prior to the discussion of the appellant's remaining points the Government is compelled to make a rather general statement of the law to avoid repetition throughout the remainder of its brief.

The failure of a defendant to object to the admission of

evidence, the testimony of witnesses, the activities of counsel, and the conduct of the court at trial should constitute a waiver of the right to assert such on appeal.

Good v. United States, 378 F. 2d 934 (9th Cir. 1967);

Duke v. United States, 255 F. 2d 721 (9th Cir. 1958),
cert denied, 78 S. Ct. 1361, 357 U.S. 920.

This is true even in areas that may fringe on Constitutional rights since it is the duty of the defendant to make the objections and raise defenses at trial. "Constitutional rights can be, and often are, waived, and this frequently happens in the course of a trial." DeRose v. United States, 315 F. 2d 482, 486 (9th Cir. 1963), cert denied, 84 S. Ct. 99, 375 U.S. 846.

Therefore, many of the points asserted by the appellant here should be denied on the very simple ground that he failed to raise them at trial. However, the Government has chosen to argue in the alternative in case the plain error rule of Federal Rule of Criminal Procedure 52(b) is deemed to apply.

C. BEFORE APPELLANT MAY RAISE THE
ISSUE OF THE VIOLATION OF ANOTHER'S
RIGHTS AS BEING A VIOLATION OF HIS
RIGHTS, THERE MUST BE A DETERMINATION:
(1) THAT SOMEONE'S RIGHTS WERE VIOLATED,
AND (2) THAT THE APPELLANT HAS THE
STANDING TO ASSERT SUCH VIOLATION

Since the appellant has chosen in subheading "B" to set forth a rather general discussion, the Government would do likewise so that the second part of the appellant's brief can be

viewed through a set framework. The appellant would have the court comb through the files and records of this case, and then take alleged instances of misconduct involving persons other than himself and find that the misconduct infected the appellant's case. These asserted areas of misconduct directed at others but claimed by appellant appear in appellant's subheadings "D", "E", "G" and "M".

The appellant has cited numerous cases, but the Government would submit that most if not all of them miss the mark. Instead, the Government would suggest the following as a method of analysis; (1) Were anyone's rights violated? (2) If so, does the appellant have standing to assert these rights in his own behalf?

Possibly the landmark decision in the area of "vicarious" constitutional rights is that of Jones v. United States, 362 U.S. 257 (1960). The entire basis of the opinion was that of standing to assert Constitutional rights and the court offered a method of analyzing standing cases. Taking a broad overview of the decision and extrapolating from its facts and circumstances the following is found.

- (1) There must be a finding that agents of the Government have committed an act that deprived someone of a right, Constitutional or otherwise.
- (2) The appellant must then show that in some way his rights have been impaired by the action.
 - (a) He must be one against whom the alleged action was directed as distinguished from

one who claims prejudice only through the use of evidence gathered as a consequence of an action directed at someone else.

(b) He must belong to the class for whose sake the protection claimed is given.

(c) He must allege and prove he was the victim of an invasion of his personal sanctity or privacy.

See also Warden v. Hayden, 387 U.S. 294 (1967).

The Government would request that the court take this two part test and use it as a binocular lense through which to view each and every assertion of a vicarious right asserted by the appellant.

D. THE RIGHT TO ALLEGED ERROR RELATIVE TO JOHN H. BOREN'S TESTIMONY HAS BEEN WAIVED, OR IN THE ALTERNATIVE, ADMISSION OF EVIDENCE IN REBUTTAL WHICH PROPERLY SHOULD HAVE BEEN INTRODUCED IN CHIEF IS NOT ERROR IN THIS CASE

Taking the points raised by appellant in the second part of his brief the Government will first discuss the testimony of Mr. John H. Boren raised by appellant in subheading "D". It must first be noted that at no time was there an objection to Mr. Boren's testimony, and, therefore, appellant should be deemed to have waived the right to assert the impropriety of such testimony on appeal for the reasons stated in Section II of this brief.

But, arguing in the alternative, the following can be gleaned

from the record. Mr. Boren was called to the stand in the Government's rebuttal (R. T. p. 570). His testimony covers some nine pages of transcript and consisted primarily of identifying a jacket alleged to have been worn by the defendant William Kier. During the surrebuttal of the defendant Kier (R. T. pp. 588-90) very brief mention was made of clothing.

The impact of the testimony of Mr. Boren can hardly have had the tumultuous effect claimed by the appellant. He said nothing more than what had been previously established by six eye witnesses (i. e., the defendant William Kier was involved in the bank robbery).

The general rule concerning the use of evidence which could have been admitted in a case in chief, but which was saved for rebuttal is stated in Rodella v. United States, 286 F. 2d 306, 309 (9th Cir. 1960), cert. denied, 365 U.S. 889, 81 S. Ct. 1042:

"The general rule has long been held that whether material evidence (which could have been received as part of the case in chief) should be admitted in rebuttal lies solely within the sound discretion of the trial court."

See also Sabbath v. United States, 380 F. 2d 108 (9th Cir. 1967, cert. denied, 88 S. Ct. 570, 389 U.S. 1003; Samish v. United States, 223 F. 2d 358 (1955), cert. denied, 76 S. Ct. 85, 350 U.S. 848, rehearing denied, 76 S. Ct. 150, 350 U.S. 897.

The court in Rodella, supra, then went on to assume that the evidence in the case should have been admitted in the case-in-

chief and re-emphasized the statement made in Austin v. United States, 4 F. 2d 774 (9th Cir. 1925):

"[I]t is not prejudicial error to admit testimony in rebuttal which should have been offered as a part of the main case, unless the party against whom the testimony is admitted is denied the right to controvert or contradict it." (Emphasis added)

Turning to the record of the instant case it is again emphasized that the testimony of Mr. Boren was not objected to, and, therefore, the court never had to pass on its admissibility. The court never questioned it on its own. The silence on the part of defense counsel and the court indicates clearly that the evidence was admissible in rebuttal. Further, the defendant Kier was given a chance to controvert the evidence in his surrebuttal and did so briefly (R. T. pp. 588-90).

Therefore, the dictates of the Rodella case are clearly met and there can be no cry from appellant at this time that he was "sandbagged".

E. CAUSING APPELLANT'S CO-DEFENDANT TO
PUT ON A JACKET WORN BY HIM DURING
THE ROBBERY WAS NOT PREJUDICIAL AND
DID NOT REFLECT ON APPELLANT'S CASE

The Government will concede that the jacket worn by the defendant William Kier was withheld until his cross-examination,

but the Government submits that its admission was not a blinding flash of light from heaven as appellant would have this Court believe in subheading "E". It was another thin level in the pyramid of evidence against the defendant Kier.

1. No Objection Was Made At Trial So The Error Should Be Deemed Waived.

The appellant was never connected with the jacket, and there was no objection to the admission of the jacket (R. T. p. 574) except that not enough foundation had been laid (R. T. p. 538). Therefore, the defendant Kier waived any right to object to the introduction of the jacket, and thereby, surely the appellant did also. See Santoro v. United States, 338 F.2d 113 (9th Cir. 1967); DeRose v. United States, supra.

2. The Use Of The Jacket Was Proper Cross-Examination

It must also be mentioned that when a defendant takes the stand in his own defense he opens himself up to broad cross-examination. Myers v. United States, 390 F.2d 793, 796 (9th Cir. 1968); DeRose v. United States, supra. Further, a defendant can be compelled to make a living exhibit out of himself without violating any of his rights. Schmerber v. California, 384 U.S. 757 (1966); Biggers v. United States, 390 U.S. 404 (1968). Therefore, the defendant Kier could be compelled

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to put the jacket upon himself and exhibit the garment like a "white broadcloth". There could be no reflection on the appellant's case from this cross-examination technique proper in itself.

Furthermore, the impact of the introduction of the jacket hardly had the effect on the defendant Kier's case that appellant would have the court believe, and had even less, if any, effect on his case. The jacket first appears in the record at R. T. 533 and testimony by Kier relative to it continued until R. T. 538. It reappeared at R. T. 571-578. To view the introduction of the jacket as a tactical thunderclap would be reading far too much into the transcript, and to stretch the issue to the point of saying that appellant's case, through his association with his co-defendant, was prejudicial infected, is to go from the absurd to the ridiculous.

Therefore, because the introduction of the jacket was not objected to, because it was within the scope of proper cross-examination, and because there is no evidence of prejudice to the appellant, appellant's contentions in subheading "E" should be denied.

F. THE STATEMENTS RECEIVED FROM APPELLANT'S CODEFENDANT WILLIAM KIER WERE OBTAINED WITHIN THE BOUNDS OF MIRANDA v. ARIZONA. THE DEFENDANT CANNOT INVOKE THE DOCTRINE OF "FRUIT OF THE POISONOUS TREE" IN RELATION TO SUCH STATEMENTS

1. Failure To Raise The Issue At Trial Should Waive It On Appeal

Once again it must be noted that at trial no motion on the part of appellant was made in relation to the interrogation of the defendant Kier raised in appellant's "G". The appellant did not raise the "fruit of the poisonous tree" ground at any time during trial although several pre-trial motions were made in his behalf at R. T. pp. 28-41. Again, the failure to raise the point at trial should preclude the appellant from raising it now.

2. Appellant's Codefendant Was Properly Questioned

But, in any event it is clear from a reading of the affidavits of the various law enforcement officers involved that the defendant Kier's constitutional rights were not violated and so the appellant was not identified and arrested through use of "poison fruit".

The affidavit of the defendant Kier (C. T. p. 27) does not allege any facts and circumstances but states the bald conclusion that "I have been brutally beaten by Los Angeles police officers."

Such a statement should be viewed with a certain amount of suspicion and not taken at face value.

The affidavit of officer Peter Weinhold (C. T. pp. 56-57) indicates that the defendant Kier was advised of all his rights and stated "I choose not to say anything until I contact my attorney. " The key affidavit is that of Sergeant Jack Williams (C. T. p. 58) who elicited the incriminating statements and the identification of the appellant from the defendant Kier. The appellant's brief completely twists the wording of that statement to fit his own purposes and the affidavit itself should be read to find what actually happened. The relevant section of the affidavit reads as follows:

"Arriving at 1:30 P. M. , I was directed to a room in which William Emmet Kier was being guarded by a uniformed officer. After introducing myself, I advised Mr. Kier that he had a right to remain silent, that any statements he made could be used against him, that he had a right to have an attorney present during questioning, and that if he could not afford an attorney, one would be appointed for him. I asked Mr. Kier if he understood this, and he replied that he did." (Emphasis added)

"At no time in the course of our conversation did Mr. Kier indicate he wanted an attorney or that he desired to terminate our conversation." (C. T. p. 58)

Appellant's brief at pages 67-68 summarizes what he

believes to be the relevant facts gleaned from the affidavits, and also the conclusions that can be arrived at from them. However, a reading of the affidavits indicates that he is completely wrong.

The defendant Kier did say that he wanted to consult counsel, but then after being readvised of his rights by Sergeant Williams, he chose to confess. There is no indication from the affidavits that Kier was "misadvised". Rather, the affidavits show that he was correctly advised by Williams and then never chose to terminate the conversation by asking for an attorney or remaining silent. The questioning by Sergeant Williams was completely separate from that of Officer Weinhold and was conducted under the dictates of the decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Admittedly, the Government has a heavy burden in proving a waiver of the rights insured by the Miranda decision. However, this Court can look to the facts and circumstances of the case and can find a knowing and intelligent waiver.

Payne v. United States, 340 F.2d 748 (9th Cir. 1965);

Walsh v. United States, 371 F.2d 135 (9th Cir. 1967),

cert. denied, 388 U.S. 915, 87 S.Ct. 2130;

Narro v. United States, 370 F.2d 329 (5th Cir. 1966);

Davidson v. United States, 349 F.2d 530

(10th Cir. 1965);

cf. Pembroke v. Wilson, 370 F.2d 37 (9th Cir. 1966).

The Government would submit that considering the affidavits upon which the appellant relies so heavily it is clear that the

defendant Kier was fully appraised of his constitutional rights, and that he knowingly and understandingly waived those rights.

3. "Fruit Of The Poisonous Tree" Doctrine
Does Not Apply To Arrests But To
Suppression Of Evidence.

Apparently, the appellant would have this Court take the doctrine of "fruit of the poisonous tree" and apply it to his arrest. However, the Government would submit that this doctrine has nothing to do with arrests, but with the suppression of evidence obtained through constitutional misconduct. Wong Sun v. United States, 83 S.Ct. 407, 371 U.S. 471 (1963), and the literally hundreds of cases based on it all deal with suppression of evidence. The appellant has neglected to cite one case to support his argument, and for very good reason -- there are none.

Therefore, the appellant cannot attack his arrest on the basis of "fruit" stemming from the statements of his codefendant.

G. THE IMPEACHMENT OF APPELLANT'S WIFE
WITH HER OWN STATEMENTS WAS PROPER

1. Failure To Raise The Point At Trial
Waives It On Appeal

Regarding the issues raised by the appellant in subheading "M", once again no objection was made to the introduction of the statement made by Mrs. Lewis on the grounds of Miranda v. Arizona,

supra, and, therefore, the appellant should be deemed to have waived the right to raise this issue on appeal for the reasons stated in section II.

2. Miranda v. Arizona Does Not Apply Here

But in any event the Miranda decision clearly does not apply. Mrs. Lewis was not a suspect (R. T. p. 566) and she was not in custody. Furthermore, she was not a defendant. Any questions asked of her and evidence thus obtained cannot be imputed to appellant merely because Mrs. Lewis was his wife. "It is clear that the common law fiction of the unity of husband and wife has no place in modern criminal law." Kivette v. United States, 230 F. 2d 749 (5th Cir. 1956), cert. denied, 78 S. Ct. 419, 355 U.S. 935; United States v. Dege, 364 U.S. 51, 80 S. Ct. 1589 (1959).

3. Witnesses Can Be Impeached With Statements Implicating A Defendant

It has been held that a defense witness can be impeached by a prior statement that necessarily implicates the defendant, even if the statement is taken under circumstances of an arrest, if the statement is limited to impeachment. Williams v. United States, 394 F. 2d 821, 822 (5th Cir. 1968). Even evidence that has been obtained by possible constitutional improprieties might be used, and a defendant's constitutional rights are not thereby violated.

Battaglia v. United States, 349 F. 2d 556, 560 (9th Cir. 1965).

Therefore, the appellant's point, relative to the necessity for Miranda warnings before a prior statement of Mrs. Lewis can be used to impeach her, has no basis.

4. Failure To Object Waives The
Husband-Wife Privilege

A more interesting point is raised incidentally by the appellant when he claims that the Government was able to introduce something through its agents which it could not have done through Mrs. Lewis (prior statement) because of the husband-wife privilege of not having to testify against the other.

The privilege of husband and wife not to testify against one another is a dual privilege which may be claimed by either spouse, United States v. Mitchell, 137 F. 2d 1006 (2nd Cir. 1943). Either the husband or the wife may object if the other testifies, Hawkins v. United States, 358 U. S. 74 (1958). However, this is a rule of privilege and the privilege may be waived, Peek v. United States, 321 F. 2d 934 (9th Cir. 1963). By allowing his wife to testify in his behalf a defendant must accept the risk as well as the benefit that might result from her testimony, United States v. Moorman, 358 F. 2d 31 (8th Cir. 1966), and a defendant who consents to the direct examination of his wife cannot rely on the privilege to bar all cross-examination, People v. Odmann, 160 Cal. App. 2d 693, 325 P. 2d 495 (1958). Therefore, a defendant waives the privilege

when he places his spouse on the stand. This is so even when the out-of-court statements of the wife are used to impeach, and such statements have the effect of testifying against the husband, Olender v. United States, 210 F. 2d 795 (9th Cir. 1954).

Therefore, the appellant waived his right to assert the husband-wife privilege when he put his wife on the stand to testify in his behalf. He further waived the privilege by failure to object to the impeachment techniques of the Government.

H. ERRORS ALLEGED TO DIRECTLY VIOLATE THE APPELLANT'S RIGHTS

Within the confines of what the Government has chosen to label the third part of the appellant's brief are those alleged errors which the appellant feels were committed directly against him. These alleged errors appear in subheading "C", "F", "H", "I", "J", "K", "L", and "N". Some of the alleged errors were objected to at trial, but many of them were not and should be deemed waived.

I. THE GOVERNMENT IS NOT REQUIRED TO PRODUCE A LIST OF WITNESSES, AND, IN ANY EVENT, THE WITNESSES DESIRED BY APPELLANT WERE IRRELEVANT TO THE CASE.

In response to the appellant's assertions under subheading "C" it must be noted that this subject was incorporated in a pretrial motion. A hearing was had on the motion (R. T. pp. 36-42) after

which the motion was denied (R. T. p. 41).

Nowhere in the United States Code is the Government compelled to produce a list of witnesses except in treason and capital cases (18 U.S.C. 3432). It has been held that the Government is not compelled to produce the names of witnesses who may or may not have been eyewitnesses to the crime.

United States v. Westmoreland, 41 F.R.D. 419 (1967);

United States v. Turner, 274 F.Supp. 412

(E.D. Tenn. 1967);

United States v. Margeson, 261 F.Supp. 628

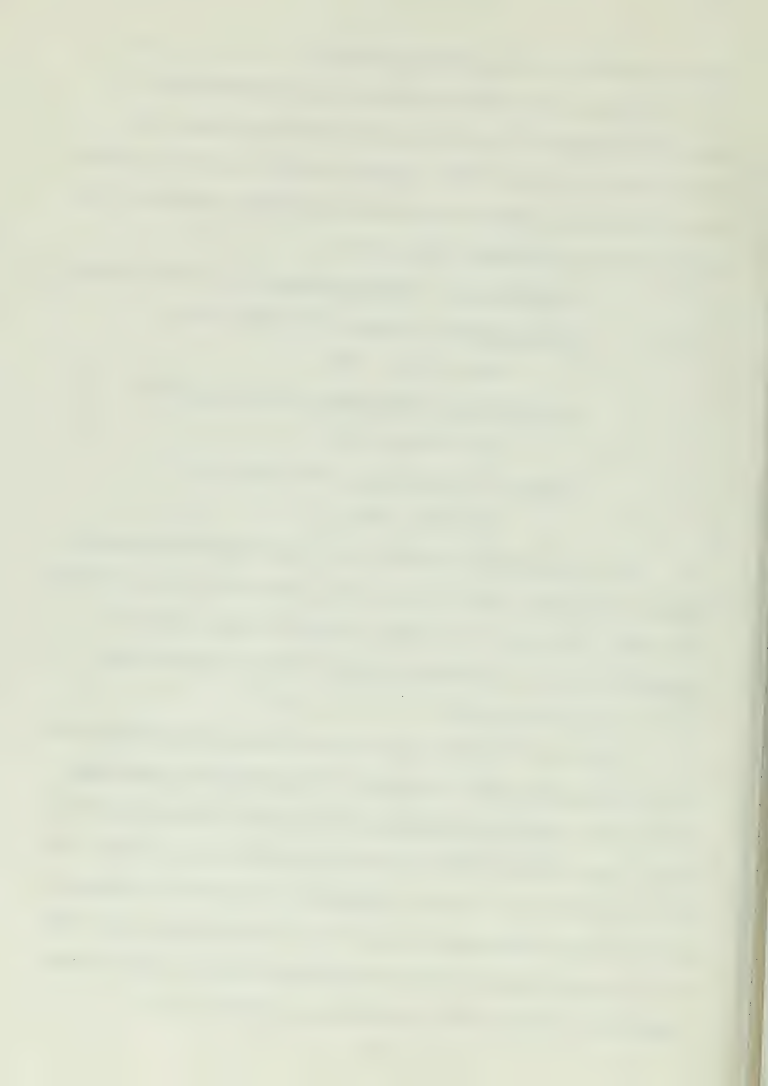
(E.D. Penn. 1966);

Smith v. United States, 216 F.Supp. 809

(S.D. Cal. 1961).

But the appellant would have this Court take the decision in Brady v. Maryland, 373 U.S. 83 (1966), and apply it to his instant demands. The Brady case speaks in terms of suppression of favorable evidence, and the government will concede that such evidence must be revealed.

Therefore, it must be determined whether the evidence that the defendant desires is "favorable". The defendant, admittedly, does not want the names of persons who can say "Yes, that is the man," and he does not want the names of persons who can say "No, that is not the man." Rather, the appellant requests the names of persons who can only say, "I don't know if that's him or not." And the government submits that this type of statement is not only not favorable to the appellant, it is just not relevant at all.



If a witness cannot testify one way or the other, it would seem his testimony is completely irrelevant, and would serve no purpose. If anything, such testimony would consume precious time and confuse the jury. Trial judges are constantly attempting to expedite the presentation of criminal cases, and to compel the court to order the revelation of witnesses who cannot say anything one way or the other borders on the absurd. A person called in from the street could testify as well as those requested by appellant.

Therefore, it should be held that such witnesses are not favorable to the defense, that the production of their names would serve no good purpose, and that the government, therefore, did not err in withholding the names of such witnesses.

J. UNDER THE CIRCUMSTANCES, THE SEARCH
 AND SEIZURE OF THE AUTOMOBILE IN
 WHICH APPELLANT MADE HIS ESCAPE
 WAS REASONABLE

1. Failure To Object At Trial Waives
 The Error On Appeal

The appellant next raises the Constitutionality of the search of the automobile in which he escaped from the vicinity of the bank robbery. It must first be mentioned that nowhere in the record does there appear any motion to suppress or dismiss based on the illegality of the search nor was there an objection at trial to the admission of the fingerprint that was found as a result of the search. Therefore, the appellant should be deemed to have waived

this defense for reasons stated supra. But, once again, if the appellant be deemed not to have waived the defense, the government would submit that the search and seizure was not illegal.

2. Search And Seizure Of The Automobile
Was Reasonable.

The standard to be used in determining whether a search and seizure of a motor vehicle is within the proscribed limits of the Fourth Amendment is whether the search and seizure was reasonable. Carroll v. United States, 267 U.S. 132, 146-47 (1925); Preston v. United States, 376 U.S. 364, 366 (1964); Cooper v. California, 386 U.S. 58, 61 (1967).

Whether a search and seizure of a motor vehicle without a search warrant is reasonable is determined by two factors: (1) the circumstances surrounding the finding and location of the automobile, and (2) whether there existed at that time probable cause to search the vehicle.

Under some circumstances law enforcement officials are justified in removing a vehicle from a public highway for the possible seizure of evidence and the fruits of a crime until they can obtain a warrant, United States v. Radford, 361 F.2d 777 (4th Cir. 1966). The circumstances usually justifying such a search have their genesis in expediency, such as when a bank has just been robbed and the law enforcement officials are attempting to locate a robber still at large, Caldwell v. United States, 338 F.2d 385

(8th Cir. 1964), or when there is a possibility that the money from the robbery will not be recovered, Boyden v. United States, 363 F.2d 551 (9th Cir. 1966).

Probable cause is also determined by the circumstances of each case. It exists where:

"[T]he facts and circumstances within their (law officers) knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been committed."

Brineger v. United States, 338 U.S. 160, 175-76 (1949) citing Carroll v. United States, supra.

What may be an unreasonable search of a house may be reasonable in the case of a motorcar. Preston v. United States, supra at 366. And, again, each case must be considered on its facts to determine whether the search and seizure was reasonable. As the Supreme Court has stated recently, Cooper v. California, supra at 62:

"It is no answer to say that the police could have obtained a search warrant, for "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." United States v. Rabinowitz, 339 U.S. 56, 66.

It is now incumbent upon this Court to look at the

circumstances of this case to determine: (1) whether the finding of the automobile was framed in expediency, and (2) whether there existed probable cause to search the automobile at that time. Edward LeSage testified that at approximately 11:20 A.M. within seconds after the robbery, he spoke to the appellant on the street outside the bank (R. T. p. 238). Further, he testified that he observed the appellant enter the Corvair (R. T. p. 240), and managed to record the letters "FFS" in the license plate (R. T. 240). He then relayed this information to an FBI agent (R. T. p. 240).

Apparently, the full description of the Corvair was broadcast to FBI agents cruising in the area of the bank because agent Orly A. Leeson testified that at 11:50 A.M. he observed a blue Corvair with the partial license number "FFS" parked (R. T. p. 249). He noted the license plate bearing the letters "FFS" had been taped over another license plate attached to the automobile (R. T. P. 250). After observing the registration, he also noticed that there was a large quantity of loose bread in the back seat of the automobile (R. T. p. 252). One must remember that the slain robber concealed his shotgun in a bread wrapper (R. T. pp. 101, 215).

Thereafter, the testimony relative to the Corvair changed to a discussion of the removal of the fingerprints from various areas of the body. Specifically, William H. Williams from the City of Los Angeles, Scientific Investigation Division, Latent Fingerprint Section, testified relative to his removal of the fingerprint from the piece of grey tape surrounding the license plate (R. T. p. 271). This removal took place at the location where the automobile was

found by the FBI. Mr. Williams was cross-examined about this removal (R. T. pp. 280, 285), but the circumstances of the removal were not explored in detail.

Summarizing the evidence relative to the Corvair and the government's position, it is patently clear that this is a classic example of a legal search and seizure. A witness had watched a bank robber enter the "get-away" car and leave the scene. A full description of the vehicle was given to FBI agents who in turn broadcast it to other agents. One such agent located the "get-away" car abandoned not more than one half hour after the robbery. It fitted the description of the "get-away" vehicle and, was further connected with the robbery by the fact that a quantity of bread was observed in the back seat and a weapon had been concealed in a bread wrapper. Also, the license plate was taped concealing the automobile's real license plates.

The FBI and police officers were seeking to locate the bank robber who had used the vehicle. Therefore, the car was seized and the fingerprints removed.

Furthermore, a real concern in bank robbery cases, in addition to locating the robber, is the location of the money. Because the proceeds from a robbery can be easily hidden in a very short time it is incumbent upon law enforcement officials to locate the robber and the money as soon as possible. This is another reason for an immediate search of the appellant's automobile.

Therefore, the government would submit that considering the need for expediency relative to the location of the appellant and

the money, and because the law enforcement officials had probable cause to search the Corvair, the search and seizure of the Corvair was constitutionally permissible.

The court's attention is invited to the following cases to determine whether the search and seizure was reasonable, and, therefore, constitutionally valid.

Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966);

Burge v. United States, 342 F.2d 408 (9th Cir. 1965),
cert. denied, 382 U.S. 829, 86 S.Ct. 63;

United States v. Baxter, 361 F.2d 116 (6th Cir. 1966),
cert. denied, 385 U.S. 834, 87 S.Ct. 79;

Sirimarco v. United States, 315 F.2d 699
(10th Cir. 1963);

Roach v. Mauldin, 277 F.Supp. 54 (N.D.Ga. 1967).

K. GILBERT AND WADE SHOULD NOT
APPLY TO PHOTO SPREADS

1. Failure To Raise The Point At Trial
Should Waive It On Appeal

In reference to appellant's subheading "H" it must be mentioned, again, that the error asserted was not raised at trial and should therefore be deemed waived for the reasons cited supra. But, in the event that the court feels that the appellant has not waived this error, if one in fact exists, the government submits the following:

2. The Supreme Court Has Recently
Declined To Rule On This Issue

The Supreme Court has recently declined to rule on whether Wade v. United States, 388 U.S. 218, 87 S.Ct. 1926 (1967), and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967), apply to photographs shown to witnesses prior to trial, Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968). The test set down in Simmons was based on the holding in Stovall v. Denno, 388 U.S. 293 (1967), and rests squarely on the consideration of each case to determine whether the use of the photographs denied the defendant due process of law. Specifically, there has to be a showing that the use of photographs was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 390 U.S. 377, 384. Since the appellant did not directly raise this issue the government will dispose of it by requesting the court to examine the testimony of witnesses Charmaine Brindly (R. T. p. 113), Mary Brown (R. T. p. 147) and John Cartelli (R. T. p. 174), who answered questions relative to the photographs they saw. There is no showing on the record of any denial of due process and so Simmons, supra, should not apply. Compare Cline v. United States, 395 F.2d 138 (8th Cir. 1968).

3. "Lineup" Errors Are Not Present
In Photo Spreads

Specifically, on the Wade-Gilbert issue the government would submit that these cases should not be applied to photographs shown to witnesses prior to trial in the absence of a defendant's counsel. The chief concern of the Supreme Court in Wade, which laid down the primary holding, was the fairness of the "confrontation" (if a photograph spread can be deemed a confrontation). At 388 U.S. 218, 227, the court stated:

"In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." (Emphasis added.)

The court then went on to delineate why a "lineup" would deny the defendant a fair trial. The failure to have counsel present at the "lineup" denies the defendant any chance to prevent

fundamental fairness in the presentation of the lineup, and, further, and more importantly, would deny him the chance to point-up this unfairness at trial. At 388 U.S. 218, 230 the court stated:

"[T]he Defense can seldom reconstruct the manner and mode of line-up Identification for judge or jury at trial."

Further, at 388 U.S. 218, 232 the court reemphasizes:

"[T]he accused's inability effectively to reconstruct at trial any unfairness that occurred at the line-up may deprive him of his only opportunity meaningfully to attack the credibility of the witness's courtroom identification."

The court went on to hold that if in-court identification stemmed from an independent source or if the identification constituted harmless error there need not be a reversal, but in that case it could not be so determined. 388 U.S. 218, 242.

The problem in the "line-up" situation is just not present when photographs are used. The entire photo spread can be reproduced in court for the consideration of judge and jury. In such a case the defense counsel has free rein to cross-examine the witnesses as to their previous identification and relate it to their in-court identification. If the photo spread was in fact unfair, counsel can surely repair any damage and in fact thoroughly discredit a witness's identification by effective cross-examination. Therefore, the government would submit that the Wade-Gilbert

line of cases should not be applied to the use of photographs prior to trial.

4. The Use Of Witnesses Who Had Seen A
 Photo Spread Was Harmless Error In
 This Case

In any event, the government would submit that the use of the photographs prior to trial and the possible in-court identification that stemmed from them was harmless error in this case. Therefore, under the holding of Chapman v. California, 386 U.S. 18 (1966), this specification of error by the appellant should be dismissed.

At trial six eyewitnesses definitely identified the appellant as the man who robbed the bank in the postman's uniform. The testimony of a seventh, Wavellyn Calhoun (R. T. pp. 152-161), involved a great deal of description but, apparently, never an in-court identification. The six definite eyewitnesses arrayed against the appellant, who made in-court identifications, were Charmaine Brindley (R. T. p. 104), Mary Brown (R. T. p. 137), John Cartelli (R. T. p. 165), Ruthie Brown (R. T. p. 199), Campbell Thompson (R. T. p. 215) and Edward LeSage (R. T. p. 254). Of those six eyewitnesses only three of them testified that they had viewed photographs prior to trial of the appellant (Brindley ((R. T. pp. 113, 114)), Mary Brown ((R. T. p. 147)), and Cartelli ((R. T. p. 174))). Contrary to the assertion of appellant Mr. Campbell Thompson did not testify that he had seen photographs, in fact he

flatly denied it (R. T. pp. 222, 223). Therefore, there were three eyewitnesses (Campbell, Ruthie Brown and LeSage) who positively identified the appellant in court, but did not testify that they had viewed photographs prior to trial.

So the government exactly splits the difference with the appellant having half its eyewitnesses seeing photographs and half not seeing them. Therefore, the fact that three of the witnesses might be infected should not be cause for reversal in this case because it was a harmless error.

L. APPELLANT WAS NOT PREJUDICED WHEN HE WAS ASKED AT TRIAL WHETHER HE WAS ADVISED OF HIS CONSTITUTIONAL RIGHTS, AND, THEREAFTER NO STATEMENT WAS INTRODUCED

1. Failure To Raise The Point At Trial Should Waive It On Appeal.

Again the ground that the appellant asserts in subheading "I" was not raised at trial in either an objection, or a motion to strike, or a request for the court to admonish the jury to disregard the defendant's testimony. Therefore, this ground should be deemed waived for reasons stated supra.

2. When The Subject Of The Admonition
Arose The Court Properly Held A
Hearing Outside The Presence Of
The Jury

Very briefly, the question of the appellant being advised of constitutional rights arose at R. T. p. 389 and R. T. p. 392 before the jury. The defendant twice denied that he had been advised of his rights (R. T. pp. 392, 393). The court, obviously sensing that there was a question of whether appellant was advised, immediately had the jury retire (R. T. p. 393), and there ensued a lengthy hearing to determine whether he was so advised (R. T. pp. 393, 430). At the end of the hearing the Assistant United States Attorney stated that he did not intend to use any statements (R. T. p. 430). The jury then returned and the subject of the appellant's being advised of his rights never arose again.

First, it must be stated that courts are required, when a confession or statements of a defendant are about to be introduced into evidence before a jury, to hold a hearing outside the presence of the jury to determine the circumstances and voluntariness of the statements.

Jackson v. Denno, 378 U S. 368 (1964);

Sims v. Georgia, 385 U.S. 538 (1967);

Pinto v. Pierce, 389 U.S. 31 (1967);

Johnson v. United States, 390 F.2d 517

(9th Cir. 1968).

It is quite clear that that is exactly what the court did in

this case, and no prejudice can be asserted by the appellant because the court did so. Further, the appellant cannot assert prejudice stemming from the fact that after the hearing the subject of the admonition of rights never arose again. If it had, then there might have been prejudice (See State v. Morgan, 182 Neb. 639, 156 N.W. 2d 799 (1967), cited by appellant at page 72 of his brief). Perhaps the defense counsel should have asked the court to strike the testimony of the appellant regarding the advising of rights, and requested that the jury be admonished to do so. But no such action was taken by defense counsel, probably for the simple reason that the testimony of the appellant was favorable to him. Having flatly denied that he had been advised of his rights, that is all that the jury heard (R. T. pp. 392, 393). The subject never arose again.

3. Appellant's Cases Are Distinguishable

The two Nebraska cases cited by the appellant (State v. Whited, 182 Neb. 282, 154 N.W. 2d 508 (1967); State v. Morgan, supra) are easily distinguished on their facts. In each case the jury heard that the defendant had been advised of his rights, and he then remained silent. The defendant sat mute after the discussion of the admonition and the trial proceeded on to other issues. The foundational questioning was left hanging like a pall over the defendant and in both cases the court stated that such testimony is irrelevant at best and tends to infer guilt if no statements are introduced. The court in State v. Whited at 154 N.W. 2d 508,

509-510 stated:

"[T]he constitutional warnings are required as foundational proof for the admission of voluntary statements and confessions of a defendant. Where no statements or confessions are offered or received in evidence, the foundational requirements for such are not material and should be excluded or stricken from the evidence. "

It must also be noted, to the detriment of the appellant, that the court in State v. Whited, supra, held that the issue of whether the defendant's constitutional rights were violated was not reviewable by the court because no objection was made at trial, exactly the situation in the present case.

In summary, it submitted that the court preserved the appellant's constitutional rights by holding a hearing out of the presence of the jury. The testimony relative to the advising of rights was only in favor of the appellant. No prejudice to the defendant can be found.

M. THE JURY WAS CORRECTLY ADMONISHED
TO DISREGARD THE IMPROPER INTRO-
DUCTION OF APPELLANT'S MISDEMEANOR
CONVICTION

The circumstances surrounding the appellant's assertions in subheading "J" are briefly stated. On cross-examination, the defendant was asked if he had been convicted of a felony and he

replied that it was a misdemeanor (R. T. 433). Thereafter, there was a discussion between court and counsel as to whether it was a misdemeanor and it was finally decided that it was (R. T. p. 434). The court then admonished the jury that they should disregard the fact that the appellant had been convicted of a misdemeanor (R. T. pp. 437-38), and added a supplemental remark (R. T. p. 439). The court asked the defense counsel if there was any objection to the admonition and the reply was in the negative (R. T. p. 438).

Apparently, now the appellant would have this Court reverse on the ground that the admission of the misdemeanor for impeachment was plain error under Federal Rule of Criminal Procedure 52(b), even though the matter was thoroughly discussed and ruled upon at trial.

1. The Jury Was Admonished

The government would strongly submit that under the circumstances there is no plain error. The court did admonish the jury at length and did all that it could to wash the subject from their minds. The subject of the trial court's admonitions to juries has been the subject of at least one appeal, and this Court has stated that they are sufficient to overcome any prejudice. Carroll v. United States, 326 F.2d 72 (9th Cir. 1963). Also, counsel had an opportunity to further object, ask for a motion to strike or even ask for a mistrial, but no such action was taken. In fact, the defense counsel concurred in the admonition given by the court.

Everything was done that possibly could have been.

2. Failure To Object To The Admonition
Of The Jury Waives The Right To
Raise It On Appeal

If there is no plain error, the failure of defense counsel to ask for relief at trial waives the right to ask for it on appeal. A case in which inappropriate comments were made before the jury is Smith v. United States, 265 F.2d 14, 18 (5th Cir. 1959) wherein the court commented:

"Failure by trial counsel to make an appropriate motion for relief in such a situation leaves nothing to appeal from, for the appellate courts are for the purpose of reviewing errors of law caused by orders and rulings of the trial court."

Furthermore, the court is not required to rule on its own motion to strike evidence or declare mistrials when defense counsel does not make an appropriate motion. Ivory Collins v. United States, 390 F.2d 260 (9th Cir. 1968).

Therefore, the government would submit that there is no error asserted by appellant in subheading "J" that would require reversal.

N. THE JURY INSTRUCTIONS WERE
PROPERLY GIVEN

1. The Court Need Only Give Instructions
In Substance

The law relative to the issue raised by appellant concerning jury instructions given by the court is briefly stated.

"A court is not bound to accept the language of a requested instruction proffered by counsel nor to give a proposed requested instruction if the court gives it in substance."

Amsler v. United States, 381 F.2d 37, 52
(9th Cir. 1967).

"If proper and adequate instructions are given, the defendant has no right to have his choice of language used in the way he prefers it."

Rivers v. United States, 368 F.2d 362
(9th Cir. 1966).

See also Shibley v. United States, 237 F.2d 327, 333
(9th Cir. 1956), cert. denied, 352 U.S. 873,
77 S.Ct. 94.

2. Failure to Object to the Instructions
Waives the Point On Appeal

If a defendant, after an instruction has been given, fails to object to the instruction as being insufficient, improper, incorrect

etc. , he waives any such objection.

White v. United States, 315 F.2d 113 (9th Cir. 1963),
cert. denied, 84 S.Ct. 58, 375 U.S. 821;
Carroll v. United States, supra, at p. 84;
Parente v. United States, 249 F.2d 752
(9th Cir. 1957).

In regard to the last point the record reveals that the court, after completing its instruction turned to defense counsel and asked if there was "anything to take up with the court" (R. T. p. 706). No objection was heard and the appellant, therefore, should be deemed to have waived any objection he now makes.

3. The Instructions Were Given In
 Substance And So Were Proper

In the alternative, an examination of the instructions given by the court reveals that they comport with Amsler v. United States, supra, in that they were given in substance. The instruction regarding the consideration of each defendant individually (R. T. p. 698) is admittedly not straight out of Mathes and Devitt, Federal Jury Practice and Instructions, but it is a paraphrase of the Mathes and Devitt, Section 15.04, and incorporates all the vital elements. Mathes and Devitt states "Each defendant is entitled to have his case determined from evidence" and the court stated "each defendant is entitled to your individual consideration on the facts in this case" (R. T. p. 698).

Likewise, the expanded alibi instruction given (R. T. pp. 694-

95) is merely a paraphrase of Mathes and Devitt, Section 8. 27. Using the plural noun rather than the singular can be interpreted as a way of phrasing the instruction. Otherwise, a separate instruction as to alibi would have had to have been given for each defendant. Further, the appellant seems to feel that the intelligence of the jury was so low that it could not determine that each defendant had a separate alibi, and that the instruction should be applied to each defendant individually. This is not supportable on any ground.

The instructions were not faulty, and, in any event, the appellant's failure to object precludes him from challenging them now.

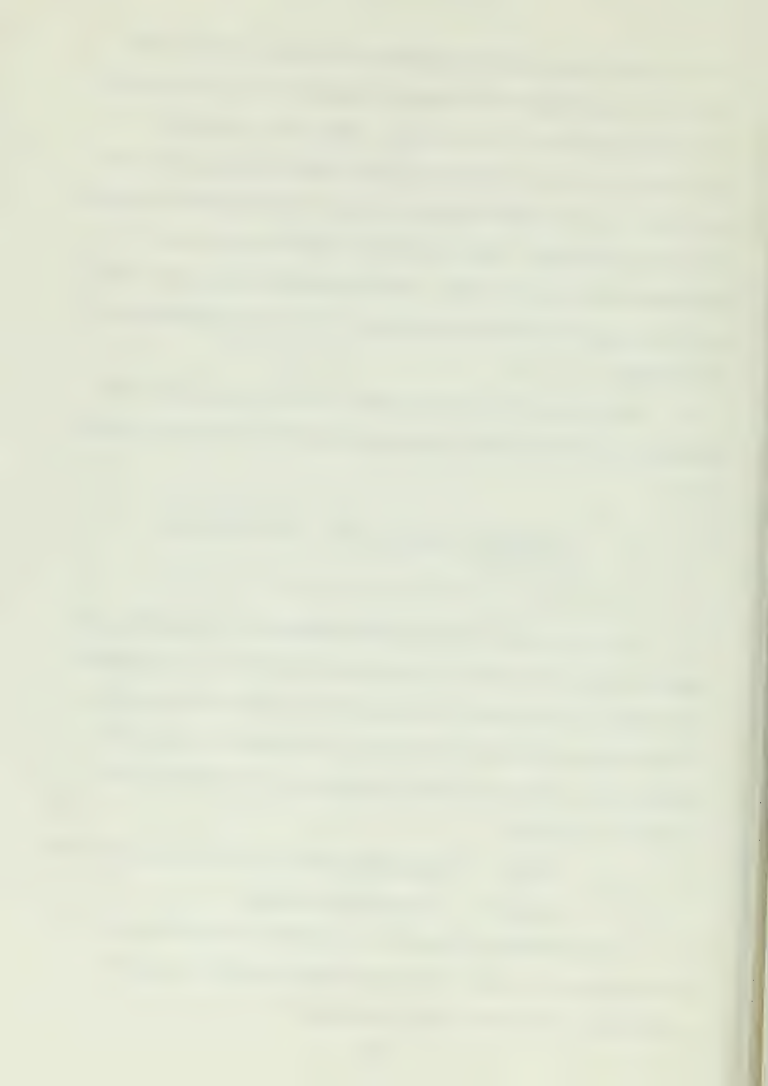
O. FEDERAL JUDGES MAY PARTICIPATE
 IN TRIALS

The contentions raised by the appellant in subheading "L" are also briefly answered. In the Federal courts, a trial judge is permitted to participate in the trial to the extent of commenting on the evidence and cross-examining of witnesses. If prejudice arising from such participation is alleged a full reading of the record is required.

Smith v. United States, 305 F. 2d 197 (9th Cir. 1962);

Carroll v. United States, supra.

Any possible prejudice to a defendant arising from the participation of a judge in the trial can be erased by careful admonitions and instructions to the jury.



King v. United States, 279 F.2d 342 (9th Cir. 1960);

Carroll v. United States, supra.

1. Jury Was Admonished To Disregard
The Comments Of The Court

In the instant case the judge admonished the jury frequently that they should disregard any remarks that he made during trial and to form their own opinions from the evidence. In fact, he explained to the jury before any opening statements that "anything that this Court says is not to influence you in any way." (R. T. p. 78). The court told them to follow their own minds again before giving the jury instructions (R. T. p. 685), and gave instructions about the duty of the jury (R. T. pp. 688-89). Further instructions concerning the participation of the court in the trial were also given (R. T. p. 697).

It is patently clear that the jury was instructed at the beginning of the trial, and at its end to disregard any participation by the court in the trial, and no prejudice can be claimed by the appellant because of such participation.

P. DETERENCE IS A VALID FACTOR TO
CONSIDER WHEN SENTENCING IN THIS
TYPE OF CASE

Since the appellant has raised, at best, a collateral issue in subheading "N" the government will answer it quickly and so provide the court with "some guidelines for the judicial

determination of probation and sentence in such a case as this."

Punishment serves several purposes; retributive, rehabilitative, deterrent, and preventive. United States v. Brown, 85 S. Ct. 1707, 381 U.S. 437, 458 (1965). However, the ultimate goal of the criminal law is deterrence. Sauer v. United States, 241 F. 2d 640, 648 (9th Cir. 1957).

Therefore, the government submits that the court was not out of line when it considered the deterrence factor with such vehemence while sentencing the appellant.

IV

CONCLUSION

It is submitted by the government that for the above-stated reasons, the appellant should be denied relief on each and every point raised by him.

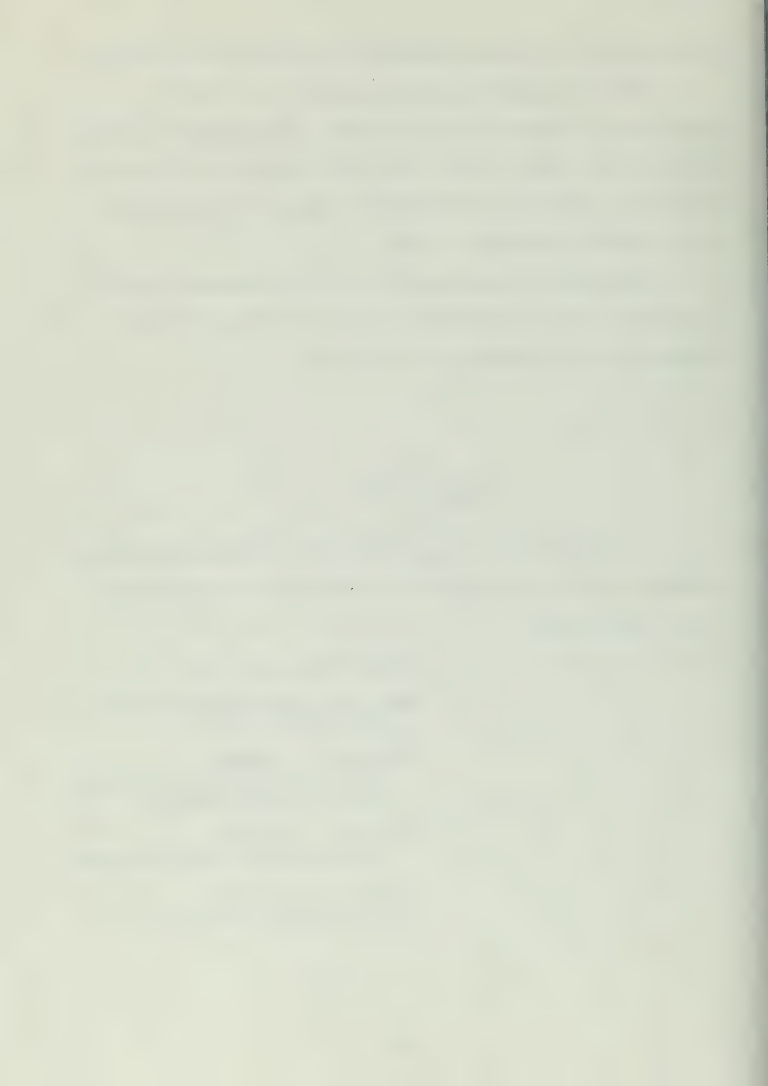
Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE HAMES-HERRERA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

NO. 22685

APPELLANT'S OPENING BRIEF

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FILED

JUN 11 1968

WM. B. LUCK

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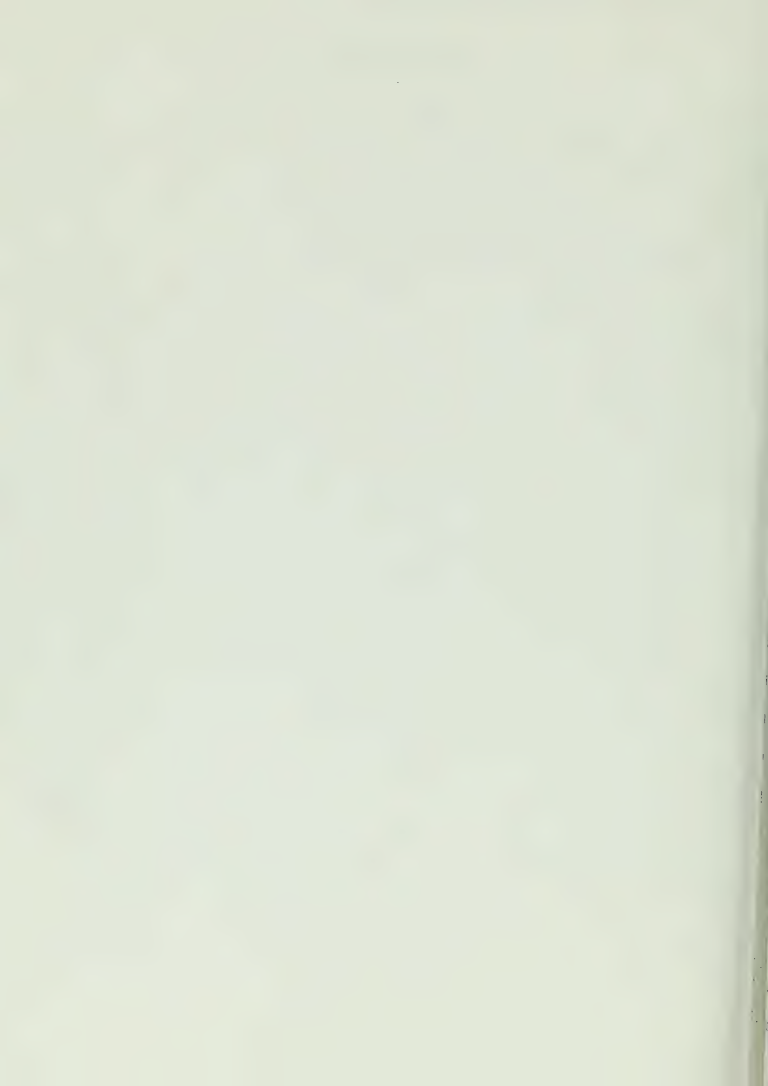


TABLE OF AUTHORITIES CITED

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Immigration and Nationality Act,
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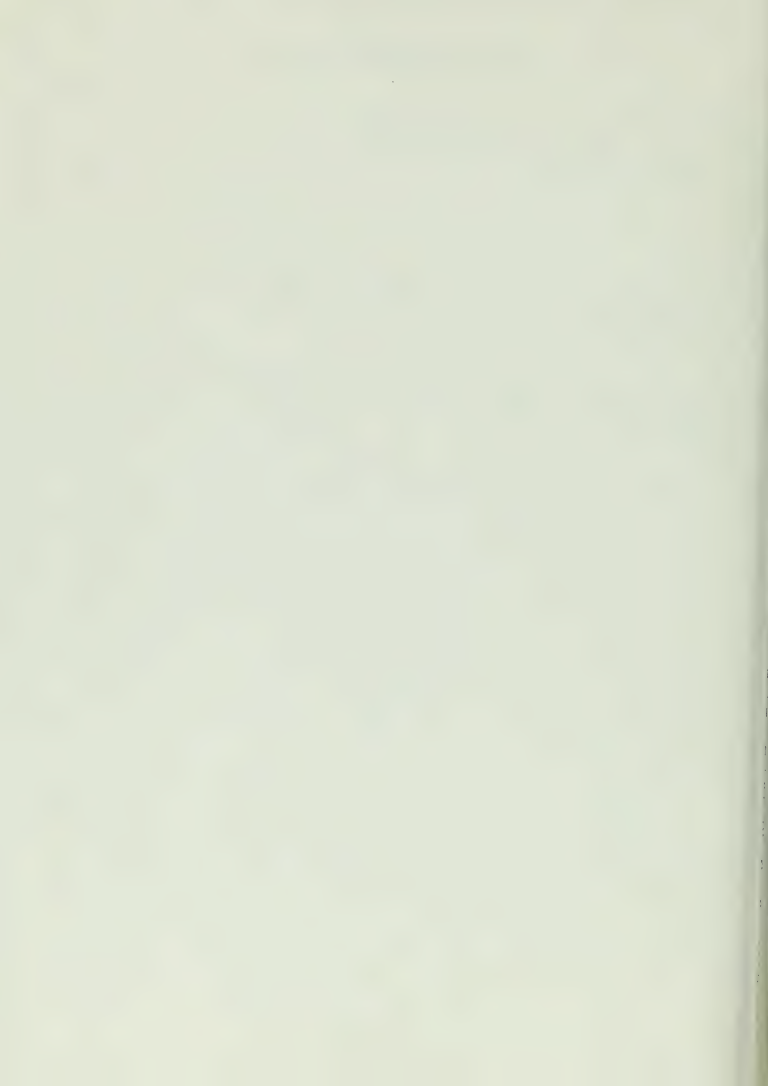
CASES

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4

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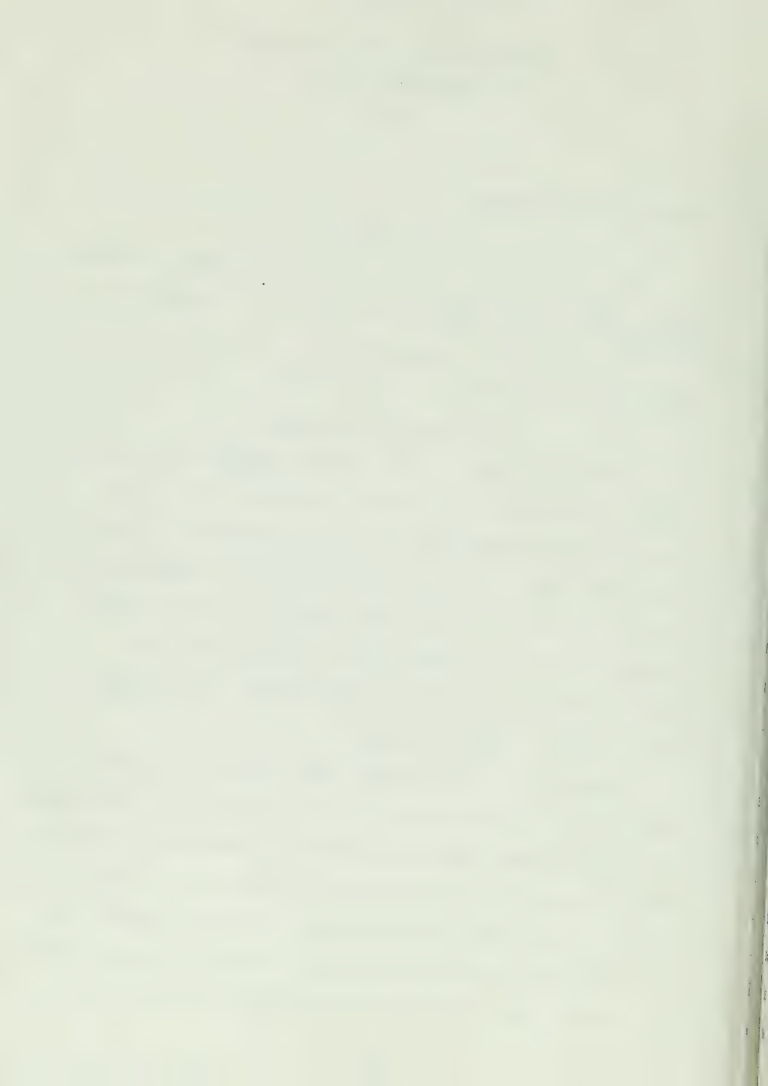
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5 ENRIQUE HAMES-HERRERA,)
6)
7 vs.) Petitioner,)
8) APPELLANT'S OPENING
9 IMMIGRATION AND NATURALIZATION)
0 SERVICE,) BRIEF
1 Respondent.)
2 _____)

3 STATEMENT OF THE CASE

4 This is an action for judicial review of a final
5 order of deportation pursuant to Section 106 of the
6 Immigration and Nationality Act, as amended, 8 U.S.C.
7 1105a, and for a de novo hearing in the United States
8 District Court on petitioner's claim to United States
9 citizenship (Tr. of Adm. Record, P.82) pursuant to
0 Section 106(a)(5)(B) of the Immigration and Nationality
1 Act, 8 U.S C. 1105a(a)(5)(B).

2 Deportation proceedings were commenced by the
3 Immigration and Naturalization Service by the issuance of
4 an Order to Show Cause and Notice of Hearing dated Decem-
5 ber 22, 1965 (Tr. of Adm. Record, Exhibit 1, p. 139). On
6 April 25, 1966 the Special Inquiry Officer rendered his
7 oral decision denying petitioner's claim to United States
8 citizenship and ordering him deported to Mexico (Tr. of
9
0



Adm. Record, p. 67). An appeal was taken from that decision by petitioner to the Board of Immigration of Appeals (Tr. of Adm. Record, p. 66), who directed that the deportation proceedings be reopened to make further search of military and birth records pertaining to petitioner's father (Tr. of Adm. Record, p. 53). On May 18, 1967, following reopened proceedings, the Special Inquiry Officer rendered his oral decision again denying petitioner's claim of United States citizenship (Tr. of Adm. Record, p. 19). That decision was appealed to the Board of Immigration Appeals (Tr. of Adm. Record, P. 18). On January 16, 1968 the Board of Immigration Appeals rendered its decision sustaining the order of the Special Inquiry Officer made on May 18, 1967 and petitioner's appeal was dismissed (Tr. of Adm. Record, P.2). Said order of the Special Inquiry Officer is now final.

This Petition for Review is filed pursuant to Section 106(a)(5) of the Immigration and Nationality Act, as amended, (8 U. S. C. 1105a(a)(5)) to obtain a de novo hearing in the United States District Court on petitioner's claim that he is a national of the United States.

Section 106(a)(5) of the Immigration and Nationality Act, as amended, (8 U.S.C. 1105a(a)(5)) provides as follows:

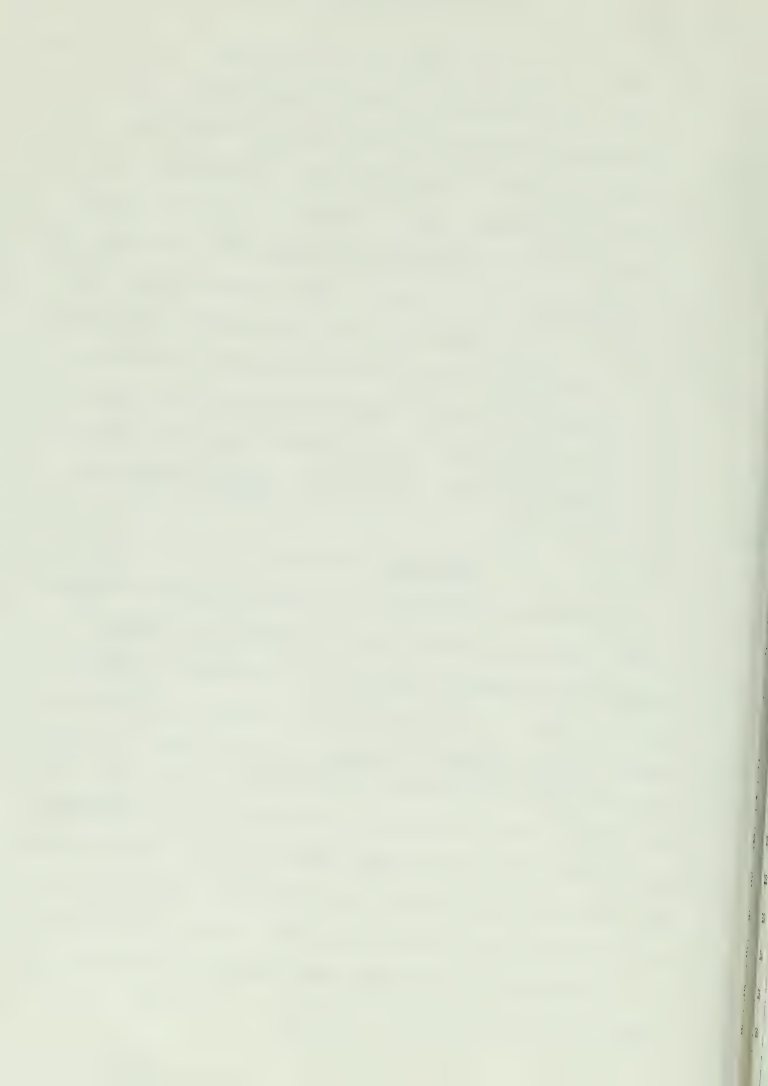
"(5) [W]henever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his

claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code.

* * *

STATEMENT OF FACTS

Petitioner predicates his claim to being a national of the United States upon the fact that his father, ENRIQUE HAMES-ROMERO, was born in the United States on March 2, 1907. In support of this contention petitioner's mother, PILAR HERRERA de HAMES, testified that on numerous occasions the petitioner's father had informed her that he was born in the in the United States, (Tr. of Adm. Record, pp. 96, 99), and that he had served in the United States Navy (Tr. of Adm. Record, pp. 96-97, 103-104). In addition, petitioner's birth certificate (Tr. of Adm. Record, Ex. 3, pp. 144-147) recites that his father was from San Diego, California.



ARGUMENT

The sole issue in dispute in these proceedings is whether or not petitioner is a national of the United States. That issue having been resolved against him in the administrative proceedings, he is entitled to a judicial determination thereof in the District Court. The only condition upon this right is that his claim to being a national of the United States not be frivolous. Section 106(a)(5) I. & N. Act, 8 U.S.C. 1105a(a)(5), supra.

It is the function of the Appellate Court on direct appeal from the final deportation order to determine whether a genuine issue of material fact is presented by the administrative record -- in this case as to petitioner's alienage. If a genuine fact issue is presented, its function is to transfer the cause to the District Court for a de novo determination of that issue and hold the Petition to Review until that determination is made and certified to the Appellate Court. Rassano vs. Immigration and Naturalization Service, 377 F.2d 971, 972, (1967), U.S.C.A. 7th Cir.

In considering a Petition for Review of a final order of deportation under Section 106(a)(5) (B) of the Immigration and Nationality Act, the Court of Appeals for the Second Circuit stated, in Pignatello vs. Atty. General of the United States, 350 F. 2d 719 (1965) at Page 723:

1 "Section 106(a)(5) codifies, and establishes
2 the procedure for effectuating the constitutional
3 principle announced by Mr. Justice Brandeis
4 in *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S.
5 Ct. 492, 495, 66 L. Ed.938 (1922) -- that the
6 claim of citizenship must be judicially rather
7 than administratively determined since "[j]uris-
8 diction in the executive to order deportation
9 exists only if the person arrested is an alien
10 [and] the claim of citizenship is thus a denial
11 of an essential jurisdictional fact.' Accord:
12 *Kessler v. Strecker*, 307 U. S. 22, 34-35, 59
13 S. Ct. 694, 83 L.Ed. 1082 (1939). It is not
14 inconsistent with this principle to require,
15 as the statute does, that there be a modicum of
16 substantiality to the claim of citizenship.
17 However, what the petitioner is seeking, and is
18 entitled to, is a de novo judicial determination
19 of the claim, not judicial review of the admin-
20 istrative disposition of that claim. Thus what
21 section 106(a)(5) requires, as a condition of a
22 de novo judicial determination of the claim
23 of citizenship, is nothing more than that the
24 claim not be frivolous. * * *

25 That the petitioner's claim to being a national of
26 the United States is not frivolous may readily be seen

1 by examination of the administrative record, the bulk of
2 which relates specifically to that claim, including two
3 appeals to the Board of Immigration Appeals. The
4 petitioner's claim to being a national of the United States
5 has been denied administratively. Under the authorities
6 cited he is entitled to a judicial determination of that
7 issue.

8 It is respectfully submitted that a genuine issue of
9 material fact as to the petitioner's nationality is pre-
10 sented, that petitioner's claim to being a national of
11 the United States is not frivolous, and that these pro-
12 ceedings should be transferred to the United States
13 District Court for hearing and determination thereof,
14 pursuant to Section 106(a)(5)(B).

15 I certify that, in connection with the preparation
16 of this brief, I have examined Rules 18, 19 and 39 of
17 the United States Court of Appeals for the Ninth Circuit,
18 and that, in my opinion, the foregoing brief is in full
19 compliance with those rules.

20 Dated: June 10, 1968.

21 GRIFFIN & GRIFFIN, by:

22 
23
24 Attorneys for Petitioner
25
26



1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)

4 I, Ann Huglin, being duly sworn depose and say:

5 I am a citizen of the United States, and a resident
6 of the County aforesaid; I am over the age of 18 years
7 and not a party to the within entitled action; my
8 business address is 301 E. Colorado Boulevard, Pasadena,
9 California 91101. On June 10, 1968 I served the within
10 Appellant's Opening Brief on the Respondent in said
11 action, by placing 3 true copies thereof in a sealed
12 envelope with postage thereon fully prepaid, in the
13 United States mail at Pasadena, California, addressed
14 as follows:

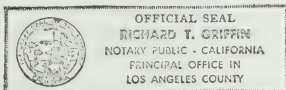
15 United States Attorney
16 312 North Spring Street
17 Los Angeles, California 90012

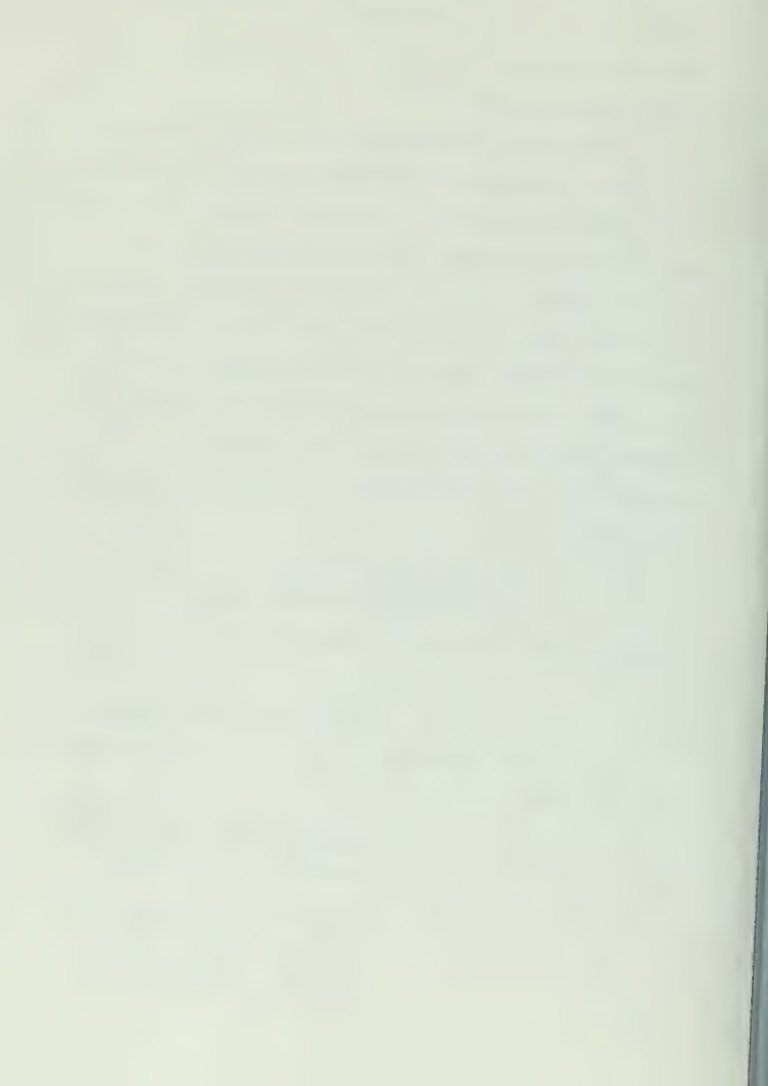
18 Attention: Mrs. Caroline M. Reynolds.

19 *Ann Huglin*

20 Subscribed and sworn to before me this 10th day
21 of June, 1968.

22 *Richard T. Griffin*
23 Notary Public in and for
24 said County and State





UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ENRIQUE HAMES-HERRERA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

NO. 22685

APPELLANT'S REPLY BRIEF

APPEARANCES:

GRIFFIN & GRIFFIN
RICHARD T. GRIFFIN, Esq.
301 East Colorado Boulevard
Suite 502
Pasadena, California
(213) 684-2810

Attorneys for Petitioner

FILED

JUL 29 1968

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1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
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5 ENRIQUE HAMES-HERRERA,)
6)
7 Petitioner,)
8)
9 vs.)
10)
11 IMMIGRATION AND NATURALIZATION)
12 SERVICE,)
13)
14 Respondent.)
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NO. 22685

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15 APPELLANT'S REPLY BRIEF
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APPEARANCES:

21 GRIFFIN & GRIFFIN
22 RICHARD T. GRIFFIN, Esq.
23 301 East Colorado Boulevard
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25 Pasadena, California
26 (213) 684-2810

Attorneys for Petitioner

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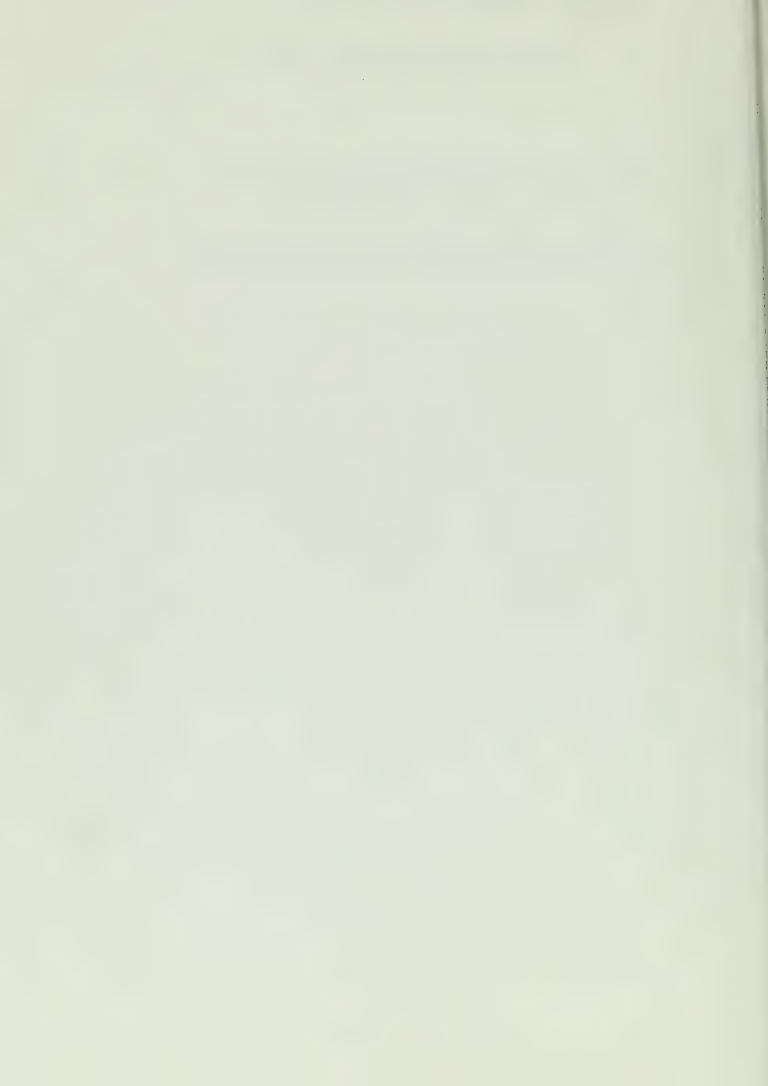
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3

Rassano vs. Immigration and Naturalization
Service (1967) 377 F.2d

2



1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3
4

5 ENRIQUE HAMES-HERRERA,)

6 Petitioner,)

7 vs.)

APPELLANT'S REPLY

8 IMMIGRATION AND NATURALIZATION)
9 SERVICE,)

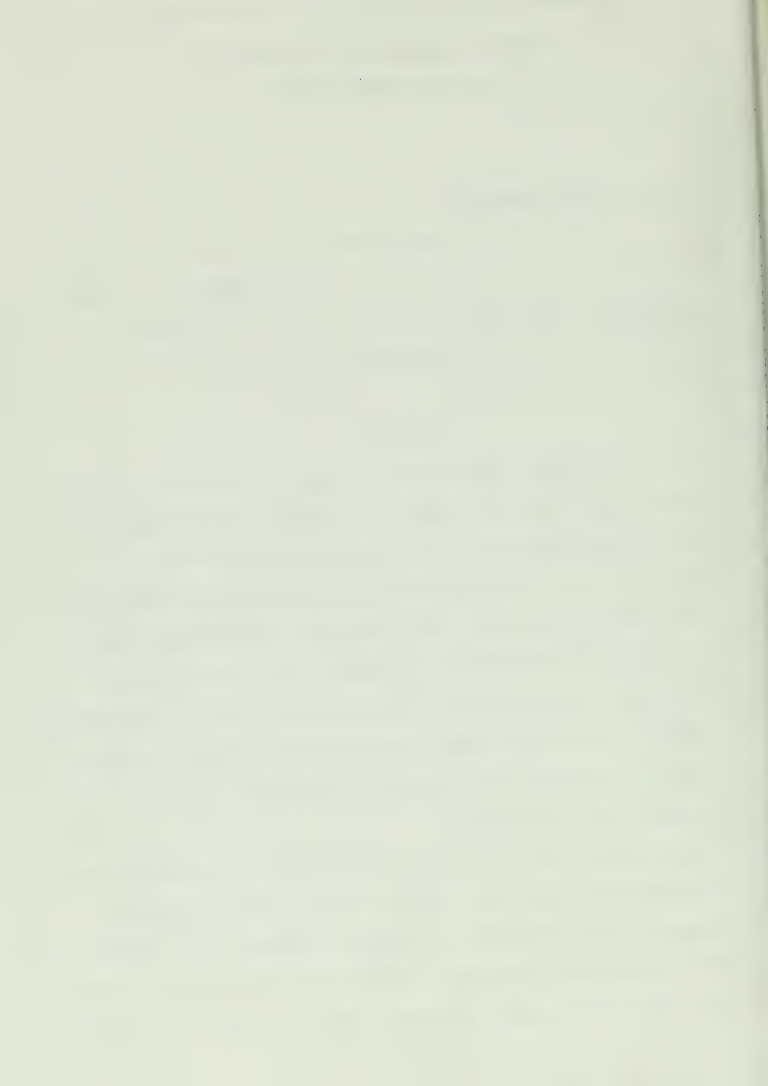
BRIEF

Respondent.)
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ARGUMENT

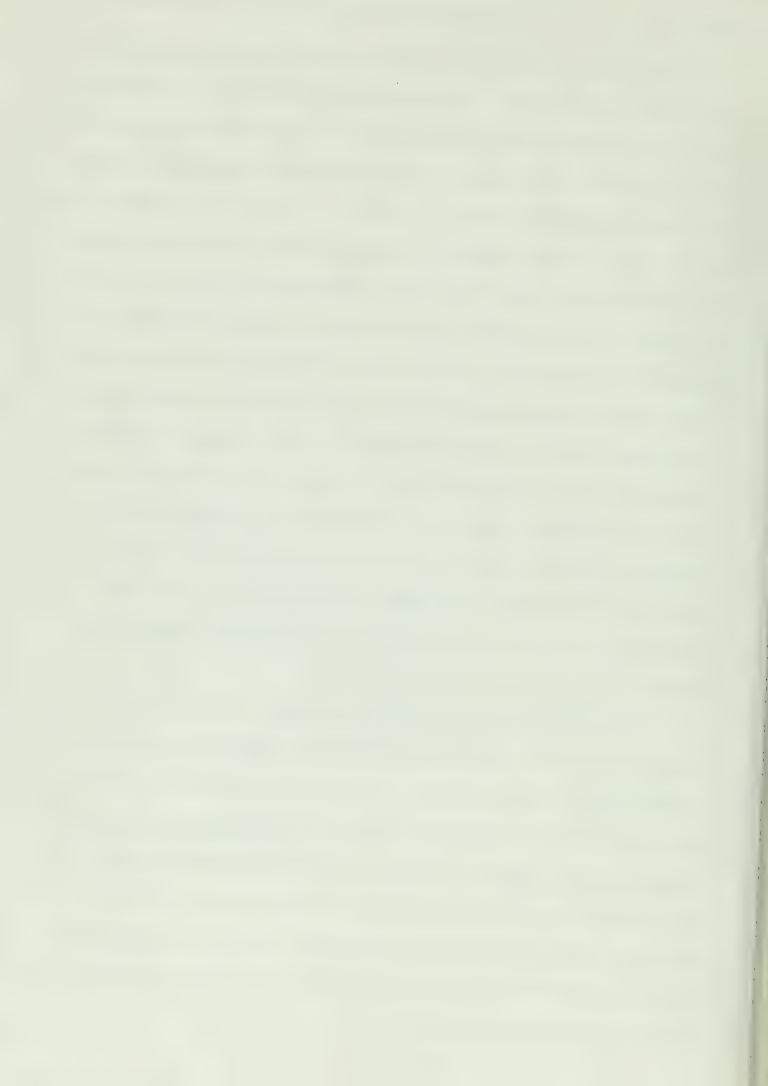
12 Respondent relies heavily upon the apparent contra-
13 dictory testimony of appellant's mother with respect to
14 the alleged birthplace of appellant's father and the
15 assertion that the terminology employed in appellant's
16 birth certificate that his father was "from" San Diego,
17 California, is meaningless insofar as it indicates the
18 birthplace of appellant's father. That there is an apparent
19 conflict in the testimony of appellant's mother the more
20 points up the fact that there is a genuine issue of
21 material fact presented.

22 Exhibit No. 4 (Tr. pp.148-149) sets forth the sworn
23 statement of appellant's mother made in Mexico City on
24 December 29, 1953 before E. DeWITT MARSHALL, an investigator
25 for the American Embassy. Therein she purportedly stated
26 that she had seen her husband's Mexican birth certificate,



1 but that the only proof of his Mexican nationality was her
2 marriage certificate. No record of the birth of appellant's
3 father in Mexico City (as alleged in the marriage certifi-
4 cate, Exhibit 7 at pages 154-158 of the transcript) could
5 be found (Exhibit 9, Tr., p. 161). As early as January 11,
6 1954, the officer before whom appellant's mother appeared
7 on December 29, 1953 felt that there was a factual issue
8 in need of resolution, with respect to the birthplace of
9 appellant's father, because said officer interpreted the
10 language in appellant's birth certificate as indicating
11 that appellant's father was born in San Diego, California.
12 (Exhibit 6, Tr., pp. 151-152). There is nothing in the
13 record to suggest that Mr. MARSHALL was engaged in
14 frivolity when he sought clarification of the matter,
15 nor does the record indicate that the matter was ever
16 cleared up by proof that appellant's father was born in
17 Mexico.

18 The representation by appellant's father at the time
19 of his marriage that he was born in Mexico City may be
20 construed as self-serving, in accordance with the views
21 expressed by the Seventh Circuit in Rassano vs. I.N.S.
22 377 F.2d 971 (1967), in that such representation may well
23 have facilitated his marriage in Mexico to a native of
24 Mexico. The testimony in Rassano, supra, was rejected
25 not for lack of credibility but for the reason that it was
26 found to be self-serving.



1 In contrast, it is a strained construction of the
2 term "self-serving" to argue that appellant's father
3 sought to achieve some advantage to himself at the time he
4 registered appellant's birth with the Mexican authorities
5 on July 7, 1930 (Exhibit 3, Tr., pp. 144-147).

6 It must be conceded that the documentary evidence
7 in support of appellant's claim to United States citizen-
8 ship in that his father was born in San Diego, California,
9 is not as complete as might be desired. Nevertheless,
10 the testimony of appellant's mother, taken in its entirety,
11 the thirty-eight year old record of appellant's birth,
12 and the thirty-nine year old photograph depicting
13 appellant's father in what appears to be a United States
14 Naval uniform and bearing a dateline in the United States
15 (Exhibit 5, Tr., p. 150 and Tr., p. 97, lines 2-25), can
16 hardly be dismissed as insignificant and insufficient to
17 raise a genuine issue of fact with respect to the birth-
18 place of appellant's father. Respondent seems to contend
19 that there is not sufficient evidence because the testimony
20 of appellant's mother is lacking in credibility. As the
21 Second Circuit stated in Pignatello vs. Attorney General,
22 350 F.2d 719 (1965), at page 723: "Petitioner's claim
23 of citizenship involves delicate issues of credibility
24 that could only be resolved with the benefit of live
25 testimony and a more complete documentary record."
26 (Emphasis added).



CONCLUSION

Appellant respectfully requests the Court to transfer these proceedings to the District Court for hearing de novo of his nationality claim.

Dated: July 25, 1968.

Respectfully submitted,

GRIFFIN & GRIFFIN, by:


Attorneys for Appellant

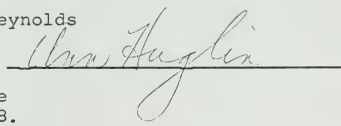
STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Ann Huglin, being duly sworn depose and say:

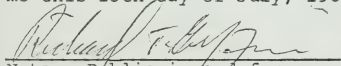
I am a citizen of the United States, and a resident of the County aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 301 E. Colorado Boulevard, Pasadena, California, 91101. On July 25, 1968 I served the within Appellant's Reply Brief on the Respondent in said action, by placing 3 true copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

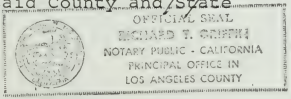
United States Attorney
312 North Spring Street
Los Angeles, California 90012

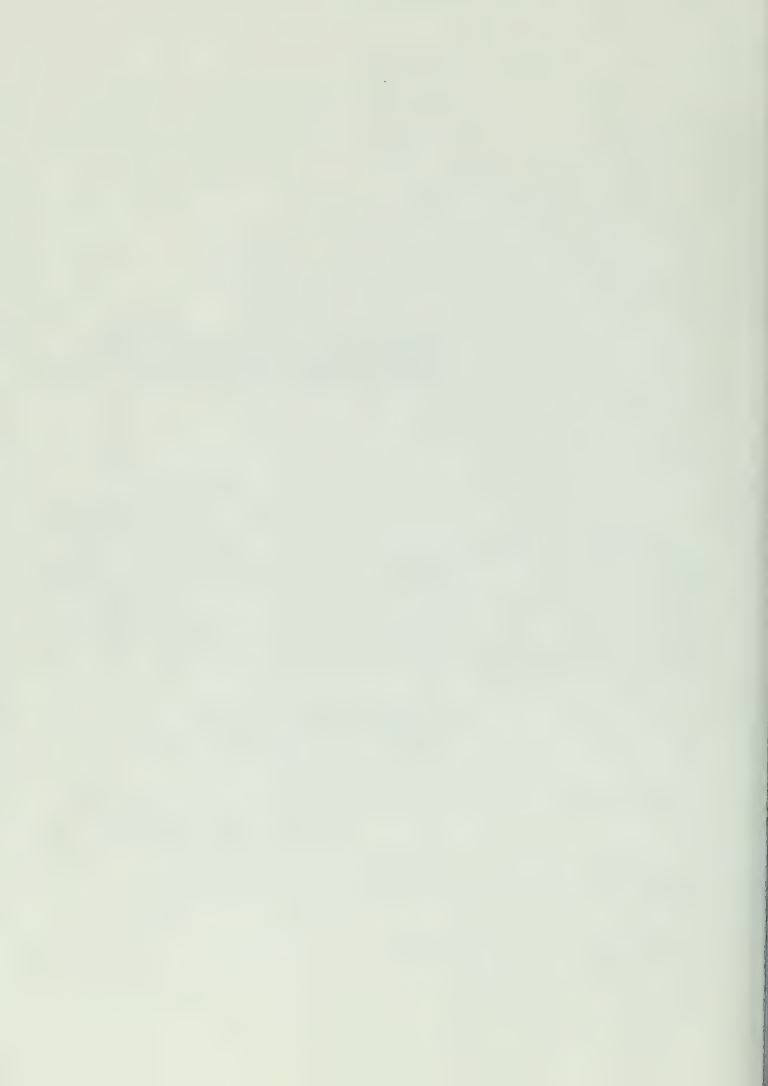
Attention: Mrs. Caroline M. Reynolds



Subscribed and sworn to before me this 25th day of July, 1968.


Notary Public in and for
said County and State





IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MURRAY A. A. MURPHY,
Petitioner-Appellant,
vs.
LOUIS S. NELSON, Warden,
California State Prison, Tamal,
California,
Respondent-Appellee.

NO. 22686

BRIEF OF APPELLEE

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of the State of California

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Deputy Attorney General

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San Francisco, California 94102
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Attorneys for Appellee

FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MURRAY A. A. MURPHY,
Petitioner-Appellant,
vs.
JAMES S. NELSON, Warden,
California State Prison, Tamal,
California,
Respondent.

NO. 22686

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of this Court to entertain this appeal from the District Court's denial of appellant's petition for a writ of habeas corpus is conferred by Title 28, United States Code section 2253, which makes a final order on a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

Appellant, Murray A. A. Murphy, was convicted after trial in the Superior Court of the State of California for the County of San Mateo of burglary on September 11, 1963, and was granted probation. On May 19, 1965, he was convicted upon a plea of guilty of possession of marijuana and being a felon in possession of a weapon. Criminal proceedings in that matter were suspended and appellant was remanded to the

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California Rehabilitation Center for treatment of his narcotics addiction problem. The director of that institution found him to be unfit for treatment and on January 6, 1966, he was sentenced to a term of one to ten years upon his narcotics conviction and not to exceed fifteen years for being a felon in possession of a weapon conviction. The following day probation was revoked on his earlier burglary conviction and he was sentenced to a term of five years to life. All of these sentences were made concurrent.

Appellant filed notices of appeal to the California Court of Appeal from all of these convictions. Since the notice of appeal from his burglary conviction was almost three years late appellant applied for, and was granted, relief under California Rules of Court 31(a) (relief from late filing). These appeals are presently pending in the California Court of Appeal and are numbered 1/Criminal 5936 (appeal from the 1963 burglary conviction) and 1/Criminal 5937 (appeal from the 1965 narcotics and possession of a weapon conviction).

On September 19, 1966, the records on appeal were prepared and forwarded to appellant. His application for augmentation of the record on appeal was denied on October 21, 1966, as was his request to be provided with reference volumes and typing paper. Appellant filed an application for the appointment of counsel to represent him on appeal on August 18, 1967, and the Court of Appeal appointed William Simmons, Esq., to represent him.

California, and the fact that the defendant was a resident of California at the time of the commission of the crime, the court held that the defendant was subject to the jurisdiction of the California courts. The court further held that the defendant was guilty of the crime charged, and that the evidence was sufficient to sustain the verdict of the jury. The court affirmed the judgment of the trial court, and the defendant was sentenced to the state prison for a term of years.

B. Proceedings in the Federal Court.

On May 17, 1967, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division [No. 7266] and an order to show cause was issued. Appellee, respondent below, filed a return to that order on September 15, 1967. C. William Simmons, having previously been appointed to represent appellant in his appeal before the California Court of Appeal, was appointed by the United States District Court to represent appellant in further proceedings before that Court. Through his attorney appellant filed a traverse to our return on November 6, 1967, and a hearing on the order to show cause was held before the Honorable George B. Harris, United States District Judge, on November 17, 1967.

On December 6, 1967, the District Court denied the petition for writ of habeas corpus without prejudice to its renewal and discharged the order to show cause. The District Court concluded that the proper forum for the resolution of the issue raised by appellant is the California Court of Appeal by way of a renewed application for augmentation of his record on appeal.

Appellant, through his attorney, moved for a rehearing on the basis of the then recent United States Supreme Court case of Roberts v. LaVallee, 389 U.S. 40 (October 23, 1967). On January 2, 1968, the merits of this motion were argued before the District Court which denied appellant's motion for rehearing on January 16, 1968. Appellant applied

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for and was granted a certificate of probable cause to appeal.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DECLINED TO ENTERTAIN APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS WHILE HE HAD AN APPEAL PENDING IN THE CALIFORNIA COURT OF APPEAL.

The Federal District Court may dismiss a petition for habeas corpus without an evidentiary hearing when, as a matter of law, the facts alleged in the petition do not constitute grounds for relief in a federal court. If the petition cannot be disposed of on purely legal grounds, then the District Court must determine from an examination of the entire record whether or not an evidentiary hearing would serve the ends of justice. Schlette v. California, 284 F.2d 27, 834 (9th Cir. 1960); Muhlenbraich v. Heinze, 281 F.2d 81, 883 (9th Cir. 1960).

As stated by this Court recently in Martinez v. Craven, ___ F.2d ___ (9th Cir. No. 22136, July 8, 1968):

"28 U.S.C. § 2254(b) and (c) provide, in substance, that an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective

to protect the rights of the prisoner, and that the applicant shall not be deemed to have exhausted the remedies available in the courts of the state if he has the right under the law of the state to raise, by any available procedure, the question presented."

ere, as in Martinez, at the time appellant filed his application for the writ he had a direct appeal from his conviction pending in the California Court of Appeal. Wherefore, appellee submits that appellant had not exhausted the remedies available to him in the courts of the State of California, and accordingly the District Court properly refused to consider his application until a proper motion for augmentation has been made in the California Court of Appeal.

II

APPELLANT'S REMAINING POINTS ON APPEAL ARE WITHOUT MERIT.

Appellant complains that he was ineffectively represented by C. William Simmons at the hearing held to determine whether or not an evidentiary hearing was required. Appellee submits that since the District Court is not constitutionally compelled to appoint counsel to represent petitioners in habeas corpus proceedings before the federal courts [Dorsey v. 111, 348 F.2d 857, 877, cert. denied 325 U.S. 890 (D.C. 1945); accord, Flowers v. Oklahoma, 356 F.2d 916, 917 (10th Cir. 1966)], appellant's contention that he was ineffectively

represented is without merit.^{1/} Appellee submits that since the District Court declined to entertain appellant's petition on a question of law -- his existing state remedy -- the quality of representation afforded by C. William Simmons is immaterial to the issues raised in the present appeal. Furthermore, the record in this case reveals that this charge is baseless.

Appellant also complains of the District Court's failure to conform the order denying his petition with Federal Rules of Civil Procedure, Rule 52(a) which requires findings of fact and conclusions of law. The Federal Rules of Civil Procedure do not generally apply to habeas corpus proceedings. Rule 81(a)(2); accord, Albert v. Patterson, 155 F.2d 429, 33 (1st Cir. 1946), cert. denied 329 U.S. 739; McCann v. Adams, 3 F.R.D. 396, 404 (D.C. N.Y. 1944)], and the District Court followed the procedure announced by this Court in Roberts v. United States, 341 F.2d 585, 587 (9th Cir. 1965), cert. denied 384 U.S. 979, by not applying Rule 52(a) to an order denying a petition for habeas corpus in the initial stage.

We submit that appellant's reliance on Roberts v. LaVallee, 389 U.S. 40 (1967) is misplaced. In LaVallee the

1. Compare, Dillon v. United States, 307 F.2d 445, 447-48 (9th Cir. 1962), wherein it was stated that unless a fair and meaningful hearing cannot be held without the aid of counsel because the presentation of the issue requires the ability to organize factual data or to call witnesses and elicit testimony there is no constitutional right to counsel in habeas corpus proceedings.

of 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616,

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denial of a transcript of the preliminary hearing without pre-payment was held to go to the very fairness of the trial which resulted in a conviction affirmed on appeal. Thus, the most obvious distinguishing difference between LaVallee and the instant case is that LaVallee had exhausted his state remedy of direct appeal, whereas the only reason we are here in this case is that appellant has refused to perfect his direct appeal from his conviction in the California courts.

In the instant case, appellant has not been denied any transcripts because he is an indigent, but rather because he has not made a proper motion for augmentation, a motion which the California Court of Appeal has expressed a willingness to grant. Wherefore, appellee respectfully submits that the District Court properly denied appellant's petition without prejudice to its renewal if he is unable to secure relief in the California courts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: September 3, 1968.

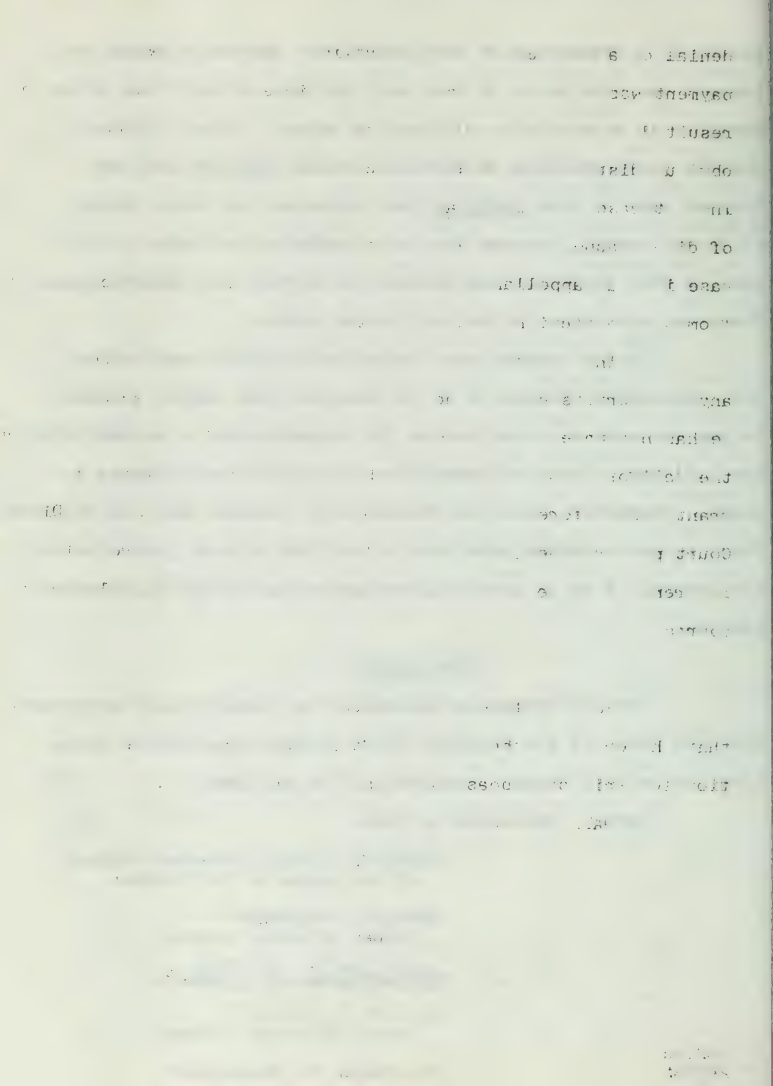
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No. 22687

JUL 1 1968

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, as Trustee in Bankruptcy for the Estate
of Thompson Electric Co., Bankrupt,

Appellant,

vs.

VALLEY ELECTRIC COMPANY, a California corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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WM. B. LUCK, CLERK

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4 Remington on Bankruptcy, Sec. 1708	16

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of Thompson Electric Co., Bankrupt,

Appellant,

vs.

VALLEY ELECTRIC COMPANY, a California corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from Findings of Fact, Conclusions of Law and Judgment thereon made and entered by the Honorable Manuel Real, United States District Judge, on December 29, 1967, in the matter below, adjudging and decreeing that appellant and plaintiff below take nothing by said action.

I.

JURISDICTIONAL STATEMENTS.

On or about March 2, 1967, upon being duly authorized by the Referee so to do, appellant, as Trustee in Bankruptcy for the Estate of Thompson Electric Co., Bankrupt, filed a plenary action in the United States District Court, Central District of California, being Civil Action No. 67-315-R [R-2].

Appellee, Valley Electric Company, a California corporation, filed its answer to appellant's complaint on or about April 4, 1967 [R-5].

The matter proceeded to Pre-Trial Conference pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of said District Court and a Pre-Trial Conference Order was duly entered on November 6, 1967 [R-10].

The matter was tried before the District Court, without a jury, on December 14 and 15, 1967, and the Court, pursuant thereto, on December 29, 1967, made and entered its Findings of Fact and Conclusions of Law and Judgment [R-78].

Within the time allowed by law, your appellant filed a Notice of Appeal [R-86], and your appellant has taken the steps required by law in presenting the necessary record on the within appeal.

The jurisdiction of the Court of Appeals is invoked pursuant to Title 11 U.S.C. Section 1291.

II.

STATEMENT OF FACTS.

On March 2, 1967, appellant, as Trustee in Bankruptcy for the Estate of Thompson Electric Co., Bankrupt, filed his complaint in the United States District Court against appellee, Valley Electric Company, a California corporation, seeking recovery of certain alleged voidable bankruptcy preferences under Section 60 of the National Bankruptcy Act [Title 11 U.S.C. §96].

Said complaint alleges that the appellee received certain alleged voidable preferences, as follows:

(1) On February 11, 1965	\$18,000.00
(2) On March 11, 1965	\$30,000.00
(3) On April 12, 1965	<u>\$20,000.00</u>
Total	\$68,000.00

After pre-trial and the entry of a rather lengthy Pre-Trial Conference Order the matter was tried without a jury and the Court entered its Findings of Fact and Conclusions of Law and Judgment, which said Judgment adjudged and decreed that appellant take nothing by said action.

Said Judgment was predicated upon the Findings of Fact that two of the three original petitioning creditors in the involuntary bankruptcy proceedings were not, in fact, creditors and therefore the adjudication was void, and therefore plaintiff and appellant had no standing to sue the defendant and appellee. Said judgment is based on the further findings that Thompson Electric Co. was not "bankrupt" and was not insolvent on the dates of the alleged preferences, and that appellee did not know or have reasonable cause to believe the bankrupt was insolvent. Said judgment is further predicated on the finding that appellee did not receive or obtain a greater percentage of its claim than have or will some other creditor of the same class.

III.

SPECIFICATION OF ERRORS.

The judgment of the United States District Court is erroneous in that the same is based upon the following erroneous Findings of Fact, to wit:

- (1) Said petition alleged that at the time said petition was signed and sworn to on June 8, 1965, and at the time said petition was filed on June 10, 1965, the alleged bankrupt, THOMPSON ELECTRIC CO., was indebted to J. B. ALLEN CO., a California corporation, in the sum of \$33,523.79. On said dates, said THOMPSON ELECTRIC CO. was not indebted to J. B. ALLEN CO. in any amount or at all, but in fact, on said dates, J. B. ALLEN CO. was indebted to THOMPSON ELECTRIC CO., the alleged bankrupt.
- (2) On said date, THOMPSON ELECTRIC COMPANY was not indebted to J. W. BAILEY CONSTRUCTION CO. in any amount or at all, but in fact, on said dates, J. W. BAILEY CONSTRUCTION CO. was indebted to THOMPSON ELECTRIC CO.
- (3) The aforesaid allegations supporting said petition in bankruptcy were each untrue. Neither J. B. ALLEN CO. nor J. W. BAILEY CONSTRUCTION CO. was a creditor of the alleged bankrupt, THOMPSON ELECTRIC CO., either at the time when said petition was signed, or at the time when said petition was filed.

- (4) Neither J. B. ALLEN CO. nor J. W. BAILEY CONSTRUCTION CO. were creditors of THOMPSON ELECTRIC CO. at the time said petition was filed. The appointment of plaintiff as trustee was based upon the adjudication based upon the petition filed by persons who were not in fact creditors.

The adjudication in bankruptcy and the appointment of plaintiff as trustee were in a proceeding initiated on the basis of statements that said J. B. ALLEN CO. and J. W. BAILEY CONSTRUCTION CO. were creditors of THOMPSON ELECTRIC CO., which statement were untrue.

- (5) THOMPSON ELECTRIC CO. was not bankrupt on February 1, 1965, and was not bankrupt at all times from and after February 1, 1965. On said date of February 1, 1965, the aggregate of the liabilities of THOMPSON ELECTRIC CO. did not exceed the aggregate of its assets at fair valuation.
- (6) At the time the payments were made on February 11, 1965, March 11, 1965 and April 12, 1965, THOMPSON ELECTRIC CO. was not insolvent.
- (7) At the time said payments were made the defendant did not know, nor did the defendant have reasonable cause to believe, that THOMPSON ELECTRIC CO. was insolvent.
- (8) Except for the sum of \$3,425.01 due to RABER SUPPLY COMPANY for merchandise delivered in March 1965 and its obligation to VAL-

LEY ELECTRIC COMPANY, THOMPSON ELECTRIC CO. paid all of its obligations as they fell due during the period from January 1, 1965 to May of 1965.

- (9) It is not true that defendant received a greater percentage of its claim than have or will some other creditor.

Said judgment is further erroneous in that the same is entered in accordance with the following erroneous conclusions of law, to wit:

1. That payments made by THOMPSON ELECTRIC CO. to defendant did not enable defendant to obtain a greater percentage of its debt than some or any other creditors of the same class. That such payments did not constitute preference. That defendant was not preferred.
2. That the adjudication that THOMPSON ELECTRIC CO. was a bankrupt, which adjudication was dated July 29, 1965, was upon a petition filed by persons who were not creditors of THOMPSON ELECTRIC COMPANY. Therefore, said adjudication was without the jurisdiction of the court and, therefore, void.
3. That the appointment of plaintiff as trustee of the estate of THOMPSON ELECTRIC CO. was, therefore, void and all proceedings carried on herein by plaintiff in such capacity were void.

IV.

SUMMARY OF ARGUMENT.

- A. J. B. ALLEN CO. AND J. W. BAILEY CONSTRUCTION CO. WERE PROPER PETITIONING CREDITORS CONTRARY TO THE DISTRICT COURT'S FINDINGS.
- B. IT IS IMMATERIAL WHETHER OR NOT J. B. ALLEN CO. AND J. W. BAILEY CONSTRUCTION CO. WERE VALID PETITIONING CREDITORS AS THE DISTRICT COURT CANNOT COLLATERALLY ATTACK THE ADJUDICATION IN BANKRUPTCY.
- C. THE DISTRICT COURT'S PREOCCUPATION WITH THE VALIDITY OF THE ADJUDICATION IMPROPERLY INFLUENCED IT TO DISREGARD THE EVIDENCE PRESENTED ON THE PROPER ELEMENTS TO BE CONSIDERED IN A PREFERENCE ACTION.
 - (1) THE EVIDENCE CONCLUSIVELY SHOWED THAT THOMPSON ELECTRIC CO. WAS INSOLVENT AT ALL TIMES FROM AND AFTER JANUARY 1, 1965.
 - (2) THE UNCONTRADICTED EVIDENCE SHOWED THAT APPELLEE KNEW OR HAD REASONABLE CAUSE TO BELIEVE THAT THOMPSON ELECTRIC CO. WAS INSOLVENT.
 - (3) APPELLEE, AS A RESULT OF THE TRANSFERS COMPLAINED OF RECEIVED AND OBTAINED A GREATER PERCENTAGE OF ITS CLAIM THAN HAS SOME OTHER CREDITOR OF THE SAME CLASS.

V.

ARGUMENT.

Introduction.

Appellant will attempt to point out hereinbelow the reasons why the aforesaid Findings, Conclusions and Judgment should be reversed and why appellant should have judgment for \$68,000.00 against the appellee.

It is submitted that a review of the evidence produced at the trial, including the Pre-Trial Conference Order with its admitted facts and exhibits conclusively shows that all elements of a voidable bankruptcy preference were proven by the trustee and that the findings of the district court on these points are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

The District Court's preoccupation with the proposition that the original involuntary petition was improperly filed because two of the three petitioning creditors were not in fact creditors dominated the entire course of the trial proceedings. This thinking of the District Court, which was finally manifested in its conclusion of law that the adjudication in bankruptcy and the appointment of appellant as trustee were "void", persisted throughout the proceedings and even in spite of direct authority cited by appellant to the contrary. No authority was cited by appellee on this subject nor did the District Court indicate what authority it was relying on nor why it chose to completely ignore the authorities cited by appellant which, it is submitted, were squarely in point.

Appellant respectfully submits that it is evident from the record that this preoccupation improperly influenced

the District Court to overlook or ignore the evidence presented on the true issues of whether or not there was a preference. The Court's questioning of counsel for appellant, it is submitted, reflects that the District Court did not apply the proper test for insolvency and engaged in various assumptions as to what would be the case if debts were forgiven by creditors, and at one point applied the state law test of insolvency. The District Court also, apparently, chose to ignore the admissions of fact contained in the Pre-Trial Conference Order itself which was also introduced into evidence. The admissions of fact in the Pre-Trial Conference Order admit insolvency and the only issues of fact specified did not include the issue of insolvency or whether the involuntary was properly filed in the first place.

A. J. B. Allen Co. and J. W. Bailey Construction Co. Were Proper Petitioning Creditors Contrary to the District Court's Findings.

J. B. Allen Co. was the general contractor on a certain work of improvement, and Thompson Electric Co. was the electrical subcontractor. In the subcontract Thompson Electric Co. promised to pay for all its labor and materials on said job. The testimony of Allen Wallace was that at a meeting in May, 1965, Thompson informed J. B. Allen that it could not complete the job and that it owed material bills of \$33,523.79 and was ceasing all operations.

At this point it was known by Allen that it would have to pay these material bills at some point in time.

As to J. W. Bailey Construction Company the above relationship was the same although a stop notice had actually been filed prior to bankruptcy by Raber Supply

Co., Inc., and Bailey had paid \$842.24 in wages to Thompson's employees.

Section 59(b) of the Bankruptcy Act [Title 11 U.S.C. §95(b)] provides that "Three or more creditors who have provable claims not contingent as to liability—amounting in the aggregate to \$500.00—" may file an involuntary petition in bankruptcy against a person.

This section of the Act was amended in 1962. As stated by the author in Vol. 3, Collier on Bankruptcy §59.14(2) at pages 599 and 600:

"The amendment of 1962, which brings the section to its present reading, does not affect the status of a petitioning creditor who has merely a contingent claim. Such a claim is still insufficient. What the amendment does is to eliminate the requirement that the claim be liquidated—"

"Under the section as it now reads, there should be no hesitation about allowing a holder of an unliquidated claim to be one of the necessary petitioning creditors whenever it is clear that the aggregate amount of claims is \$500.00 or more."

Both J. B. Allen and J. W. Bailey had claims which were no longer contingent when it was learned in May of 1965 that Thompson Electric was closing its doors and, in breach of the subcontracts, would not complete its work for Bailey and Allen. True, J. B. Allen's claim did not become liquidated until the stop notice was filed (after bankruptcy) but its claim was certainly not contingent at the time the involuntary was filed on June 10, 1965, for the subcontract had already been breached by Thompson as was the case with the subcontract with J. W. Bailey; and Bailey had already been served with

a stop notice and had been required to pay wages of Thompson's crew so that their claim was not only not contingent but was also liquidated prior to bankruptcy.

As stated in the Senate Report recommending the passage of the 1962 Amendment, which said report is set out in this Court's decision of *In re Coldiron and Peebles Oil Company* (9th Cir. 1966) 356 F. 2d 266:

"As it presently reads, Section 59b forecloses a creditor with a large unliquidated claim—e.g. *one for breach of contract*—from joining in a petition, although it can be made abundantly clear that his claim exceeds the statutory minimum of \$500.00." (Emphasis added).

B. It Is Immaterial Whether or Not J. B. Allen Co. and J. W. Bailey Construction Co. Were Valid Petitioning Creditors as the District Court Cannot Collaterally Attack the Adjudication in Bankruptcy.

Not only were not J. B. Allen and J. W. Bailey parties to the action below so that the Court could not make an adverse determination as to their claims, but such a determination has no bearing at all in a plenary preference action.

The involuntary petition was filed on June 10, 1965, and pursuant to a *Consent* filed by the alleged bankrupt, it was adjudicated a bankrupt. That Order of Adjudication became final and no Review or Appeal was taken therefrom.

The only person that *could* have appealed the adjudication was the bankrupt itself or its stockholders and *it had consented* to the entry of the Order.

Section 18(b) [Title 11 U.S.C. §41(b)] as amended by the 1938 Act sets forth who may defend an involuntary petition as:

“The bankrupt and, in the case of a petition against a partnership, any general partner—”

As stated in *Vol. 2 Collier on Bankruptcy*, §18.33 at pages 91 and 92.

“Under §18 as originally enacted in 1898, creditors could intervene under §18b and oppose a petition in involuntary bankruptcy. This rule was designed to protect creditors whose interest might be affected by the adjudication. The Act of 1938, however, provided that creditors may no longer intervene in opposition to an involuntary petition.”

It therefore follows that if the bankrupt is the only one who can contest the involuntary petition, the bankrupt is the only one that could attack the adjudication. In the instant case, however, the bankrupt consented to the entry of the Order of adjudication and would be estopped from attacking the Order. However, this is all surmising. The fact is that the attack on the adjudication in the instant case is a collateral attack despite counsel for defendant's attempt to label it a direct attack [Tr. p. 58].

In the case of *Huttig Mfg. Co. v. Edwards* (8th Cir. 1908), 160 Fed. 619, which, as here, involved a plenary suit by a trustee in bankruptcy to set aside a voidable preference, the Court stated, on page 622:

“The manufacturing company attacks the validity of the adjudication that D. Winter was a bankrupt upon the ground that one of the three petitioners in the involuntary proceeding was not a credi-

tor, but since the attack was made in a proceeding by the trustee to annul a preference it is a collateral, not a direct one. An adjudication of bankruptcy is entitled to the same verity and is no more to be impeached collaterally than other judgments or decrees of courts of competent jurisdiction. *It cannot be assailed by the defendant in a suit by the trustee to recover or avoid a preference upon the ground that one of the petitioners was not in fact a creditor of the bankrupt.* When the record shows jurisdiction the adjudication of bankruptcy is subject to impeachment only by a direct proceeding in a competent court." (Emphasis added).

Also, in the case of *Teiger v. Stephan Oderwald* (D.C. N.Y. 1940), 31 F. Supp. 626, which also, as here, involved a preference action by a trustee in bankruptcy, the Court stated on page 627:

"The fifth affirmative defense alleges that the petition in bankruptcy is defective in that 2 of the 3 petitioning creditors have no provable claim.—

"The Fifth defense must also fall. There can be no collateral attack upon the adjudication in bankruptcy." [Citing *Huttig v. Edwards, supra*, and *Fairbanks Steam Shovel Co. v. Wills* (1916), 240 U.S. 642 which involved a suit by a bankruptcy trustee to set aside a chattel mortgage].

A similar holding was made in the case of *Ward v. Central Trust Co. of Illinois* (7th Cir. 1919) 261 Fed. 344, which involved a suit by a trustee in bankruptcy to set aside a fraudulent conveyance.

The *Huttig v. Edwards* case, as well as *Teiger v. Stephan Oderwald* case, appear to be "on all fours" with the present case.

C. The District Court's Pre-Occupation With the Validity of the Adjudication Improperly Influenced It to Disregard the Evidence Presented on the Proper Elements to Be Considered in a Preference Action.

- (1) **The Evidence Conclusively Showed That Thompson Electric Co. Was Insolvent at All Times From and After January 1, 1965.**

In examining the evidence presented to the District Court on the issue of insolvency we have the testimony of Mr. Thompson that Thompson Electric Co.'s financial condition remained substantially the same from and after January 1, 1965, until the date of the bankruptcy [Tr. p. 37]; we have the bankruptcy schedules which were attached to the Pre-Trial Conference Order [R-10] and which set forth assets of \$36,970.31 and liabilities of \$122,498.29; we have the testimony of John Roche that Thompson Electric Co.'s books reflected an insolvent situation at the time of bankruptcy [Pltf. Ex. 4 and Tr. p. 89] as well as on December 31, 1964 [Tr. p. 90]; we have the testimony of Mr. Rothman that the trustee liquidated the assets for \$15,968.94 [Tr. p. 68 and Pltf. Ex. 2]. The claims filed against the estate far exceeded that sum [Pltf. Ex. 1] exclusive of Valley Electric's claim of \$105,000.00, which was withdrawn.

And finally, and most importantly, we have the Pre-Trial Conference Order itself [R-10] which recites on page 9 line 31 through page 10 line 4 that the balance sheet and profit and loss statement attached thereof "correctly represent the financial condition of Thompson Electric Co. for those dates." The balance sheet [which is the same as Pltf. Ex. 4] reflects a deficit of \$120,-

527.91 on June 17, 1965, and a loss of \$27,088.59 for the period of January 1, 1965, through June 17, 1965, which means there was a deficit at the beginning of the period of \$93,439.92.

This is a matter of admitted fact in the Pre-Trial Conference Order which the trial court, apparently, chose to ignore. The Pre-Trial Conference Order and the Exhibits attached thereto were introduced into evidence as Defendant's Exhibit A [Tr. p. 19].

It is submitted that the above uncontradicted evidence conclusively shows that Thompson Electric Co. was insolvent at all times from and after January 1, 1965, within the meaning of Section 1 (19) of the Bankruptcy Act [Title 11 U.S.C. §1 (19)] which provides:

“A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at fair valuation be sufficient in amount to pay his debts.”

(2) The Uncontradicted Evidence Showed That Appellee Knew or Had Reasonable Cause to Believe That Thompson Electric Co. Was Insolvent.

Section 60(b) of the National Bankruptcy Act [Title 11 §96(b)] provides that in order to recover a preference the trustee must prove:

“the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

It must be noted that actual knowledge is not required. The creditor must only have reasonable cause to believe the bankrupt was insolvent at the time of the transfer.

In Vol. 4 *Remington on Bankruptcy* §1708 the author sets forth the standard of "reasonable cause to believe":

"The creditor charged with having received a voidable preference has 'reasonable cause to believe' that the debtor is insolvent at the time of the payment or transfer if, at that time, he knew or should have known *from facts brought to his attention, or readily apparent*, that the debtor's financial situation was so precarious *that a man of ordinary prudence would deem him to be insolvent or make further inquiry* before dealing with him as a solvent person. [*Security First National Bank vs. Quittner* (9th Cir 1949) 176 F 2d 997; *In re Steinberg* (D. C. Cal. 1956) 138 F.Supp 462; *In re Beedle Whiton Co.* (D.C. Minn. 1955) 132 F Supp 558]. As stated, actual knowledge of the insolvency is not required to be shown [*Swanson & Sons Poultry Co. vs. Wylie* (9th Cir 1956) 237 F 2d 16]. *The creditor is charged with the knowledge which a reasonably diligent inquiry would disclose*". (Emphasis added).

In the case of *Dudley v. Eberly* (D.C. Ore. 1962) 201 F. Supp. 728, the Court stated on page 732:

"It is sufficient if a state of facts has been brought to the attention of the creditor concerning the affairs and financial condition of the debtor

which would lead a prudent businessman to conclude that the debtor was insolvent and *a creditor is charged with knowledge which reasonable diligent inquiry would disclose*. *Swanson & Sons Poultry Co. vs. Wylie* (9th Cir 1956) 237 F 2d 16 —“If Eberly had inquired concerning the other indebtedness, he probably would have learned that the bankrupt’s indebtedness was in excess of the reasonable value of its assets. The avoidance of obvious and reliable sources of information will charge the creditor with knowledge he could have obtained from them. *Pittsburgh Plate Glass Co. vs. Edwards* (8th Cir 1906) 148 F. 377, 378.” (Emphasis added).

In the instant case appellee called a meeting in January, 1965, “to see what the problem was, why we didn’t have our account paid up.” [Tr. p. 9]. They went over the bankrupt’s receivable and payables [Tr. pp. 9 and 10]. Mr. Thompson told appellee that he would have financial trouble if the Vandenburg job did not materialize, and Mr. Thompson further testified appellee was aware of his present financial difficulties by looking at his receivables and payables [Tr. p. 11]. Mr. Thompson further told appellee in January, 1965, that general business in the Santa Barbara area had been poor for some time [Tr. p. 12]. Appellee’s president had been pressing Mr. Thompson quite hard for financial statements during the last few months of the bankrupt’s operation [Tr. p. 13]. Mr. Thompson told appellee’s officers in January, 1965, that he was having problems meeting his bills [Tr. p. 15]. In January, 1965, the

bankrupt owed appellee about \$100,000.00, most of which was past due [Ex. A attached to Pre-Trial Order]. The testimony of appellee's president was that he didn't believe that the bankrupt had assets of \$100,000.00 [Pltf. Ex. 3]. Mr. Wallace testified that appellee's president had admitted in May, 1965, that appellee had kept a very close touch on Mr. Thompson's finances [Tr. p. 81].

It is submitted that the foregoing evidence *which is uncontradicted by appellee* (as no evidence whatsoever was offered by defendant below) is more than sufficient to show that a state of affairs existed and was brought to the attention of appellee that would have lead a prudent businessman to conclude that the bankrupt was insolvent or to make further inquiry before dealing with the bankrupt as a solvent person. In other words the evidence clearly shows that appellee had reasonable cause to believe that the bankrupt was insolvent.

(3) Appellee, as a Result of the Transfers Complained of, Received and Obtained a Greater Percentage of Its Claim Than Have or Will Some Other Creditor of the Same Class.

The testimony of Mr. Rothman shows that the trustee has liquidated all assets of the bankrupt and has on hand approximately \$11,000.00. The total claims filed against the bankrupt estate total \$169,129.76 including \$4,792.32 in prior tax and labor claims [Pltf. Ex. 1]. It appears that any dividend to general creditors will not exceed 4%. The transfers to appellee amounted to a great deal more than 4%.

As stated by Mr. Justice Brandeis in the case of *Palmer Clay Products Co. v. Brown*, 297 U.S. 227 at page 229:

“The petitioner contends that a creditor who receives a part payment of his claim does not receive a preference, although he has reason to believe that the debtor is insolvent, provided the debtor’s assets at the time of the payment would, if then liquidated and distributed, be sufficient to pay all the creditors of the same class an equal proportion of their claims.

“Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor’s assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. The payment on account of say 10% within the four months will necessarily result in such creditor receiving a greater percentage than other creditors, if the distribution in bankruptcy is less than 100%.

We may not assume that Congress intended to disregard the actual result, and to introduce the impractical rule of requiring the determination, as of the date of each payment, of the hypothetical question: What would have been the financial result if the assets had then been liquidated and the proceeds distributed among the then creditors?”

VI.
CONCLUSION.

It is therefore respectfully submitted that the Findings of Fact and Conclusions of Law and Judgment of the District Court entered on December 29, 1967, should be reversed and that appellant should have judgment against appellee in the sum of \$68,000.00 representing voidable bankruptcy preferences.

Appellant has attempted to point out the unwarranted preoccupation of the District Court with irrelevant issues which improperly influenced the District Court to erroneously decide the real issues so that its decision would not be based solely upon whether the adjudication in bankruptcy was proper. As the District Court stated on page 146 of the transcript:

“Fortunately I don’t have to do that.”

However, in support of its judgment the District Court determined that the adjudication was “void” and that the appointment of appellant as trustee was “void”.

It is difficult to conceive of the confusion and uncertainties of administration in bankruptcy matters that this decision could cause if allowed to remain the law of this Circuit.

What is appellant to do in the administration of the bankrupt estate of Thompson Electric Co. since his appointment is “void” and since the adjudication is “void”. Is appellant to return monies on hand to the bankrupt? Is he to seek out the purchasers of the bankrupt’s assets and obtain their return? Is he to inform the Referee that his Order has been declared to be void with no hearing before him?

There can be no certainty, and therefore forceful and competent administration of bankrupt estates if receivers and trustees must live with the possibility that adjudications in bankruptcy (or any other Order of a Referee) may be overturned collaterally, at any time or in any Court, or even directly, after said Orders have become final for the purposes of review or appeal. However, if allowed to stand, the District Court's decision herein will bring about exactly that state of affairs for it has made exactly that determination.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,

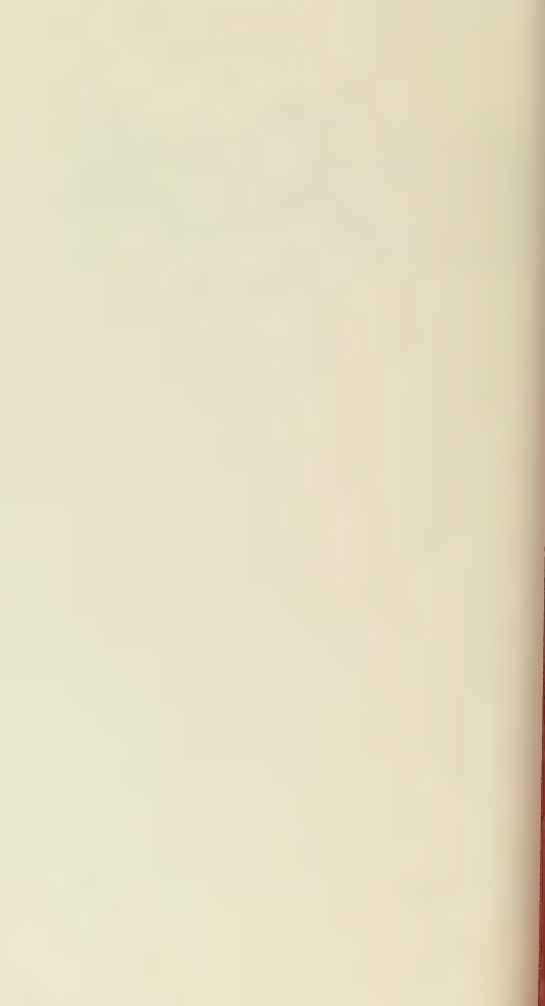
By ROBERT A. FISHER,

Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FISHER



No. 22687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, as Trustee in Bankruptcy for the Estate
of Thompson Electric Co., Bankrupt,

Appellant,

vs.

VALLEY ELECTRIC COMPANY, a California corporation,

Appellee.

APPELLEE'S BRIEF

FILED

JUL 26 1968

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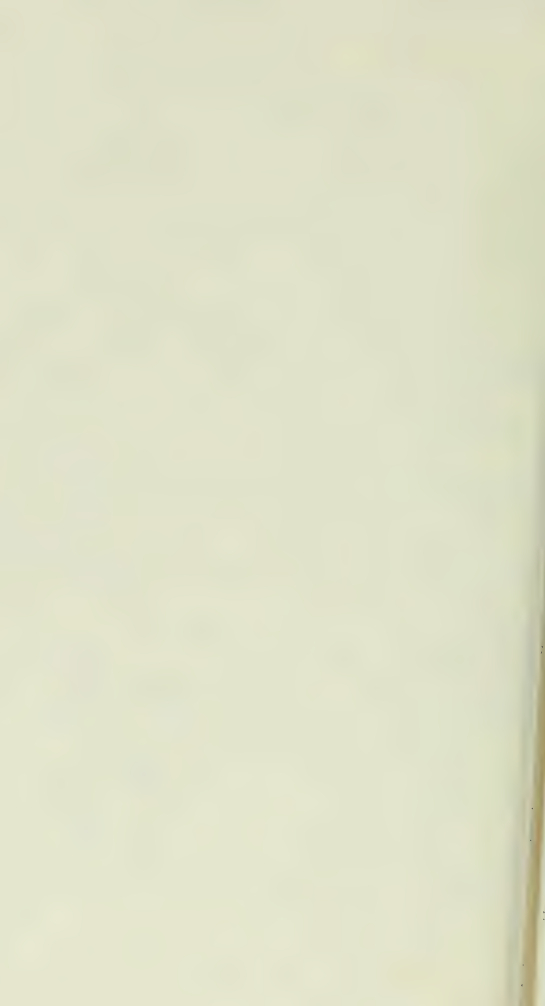
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VALLEY ELECTRIC COMPANY, a California corporation,

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APPELLEE'S BRIEF.

I.

Scope of the Appeal.

The Notice of Appeal and the Appellant's Opening Brief leave uncertain the scope and basis of the appeal.

The opening statement of appellant's brief states that this is an appeal:

"from findings of fact, conclusions of law and judgment thereon made and entered by the Honorable Manuel Real, United States District Judge."

The Notice of Appeal makes a similar statement.

The specification of errors states "The judgment of the United States District Court is erroneous in that

the same is based upon the following erroneous findings of fact to wit:”

Then follow quotations from the findings. The quoted findings are very incomplete.

The trial court did find by findings of the following numbers:

No. 4—That Thompson Electric Co. was not bankrupt on February 1, 1965, and was not bankrupt at all times from and after February 1, 1965.

No. 9—That at the time the payments were made to appellee, Thompson Electric Co. was not insolvent.

No. 10—That at the time those payments were made the appellee did not know and did not have reasonable cause to believe that Thompson Electric Co. was insolvent.

No. 11—That deliveries of merchandise by Appellee more than equalled the amount that was paid to it and that all of the obligations of the Appellee were paid as they fell due except the obligation to Appellee as stated. Also by Finding 11 states it is not true that defendant received a greater percentage of its claim than has or will some other creditor.

Appellant's arguments are directed to his contention of what the evidence showed. Typical is the statement of page 8 of the Brief:

“It is submitted that a review of the evidence produced at the trial, including the pretrial conference order with its admitted facts and exhibits, conclusively shows that all elements of a voidable bankruptcy preference were proven by the trustee and that the findings of the District Court on

these points are clearly erroneous within the meaning of rule 52(a) of the Federal Rules of Civil Procedure.”

While not fully clear, it does appear that the basis of the appeal is that the findings of the District Court are “*clearly erroneous*” under Rule 52(a).

Unless findings which we quote were “*clearly erroneous*” they support the judgment whatever may have been the other findings of the trial court.

II.

The Application of the Clearly Erroneous “Rule”.

The applicable portion of Rule 52, subdivision (a) is as follows:

“Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

In *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 356 F. 2d 24 (9 Cir. 1966) the attitude of the appellant was similar to the attitude here. There the court said at page 26:

“Appellant though reluctant to characterize the issue involved as one of fact, does nevertheless ground its argument on a purported demonstration of the ‘clearly erroneous’ nature of the District Court’s findings. In so doing, however, appellant disregards the severe limitations imposed on an appellate court in reviewing findings of fact. It is not our function to reevaluate the evidence presented below. We cannot substitute our judgment for the first hand evaluation made by the trier

of fact. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure our obligation is to determine if the findings below were 'clearly erroneous.' This statutorily imposed standard does not vest us with the power to reweigh the evidence presented at trial in an attempt to assess which item should and which should not have been accorded credibility. Our task, rather, is to determine if there exists evidence of substance to support the findings of fact of the trial court. Thus, it does not aid appellant's position on review to merely extract the evidence presented which supports his position; rather it must additionally demonstrate that no substantial evidence was presented which supports the District Court findings in favor of appellee."

The rule, stating the limitation on the appellate court, is also stated in *Friedman v. Fordyce Concrete, Inc.*, 362 F. 2d 386, where it is said at page 387:

"The basic rules to be applied in resolving the question before us are axiomatic. This court, upon review, will not retry issues of fact, neither will we substitute our judgment on such issues for that of the trial court. We are not permitted to set aside a finding of fact unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. *Cleo Syrup Corporation v. Coca-Cola Co.*, 139 F.2d 416, 417, 150 A.L.R. 1056 (8 Cir. 1943). Findings of Fact are presumptively correct and the complaining party has the burden to clearly demonstrate that error exists in the findings of the trial court. *Joseph A. Bass Company v. United States*,

340 F.2d 842 (8 Cir. 1965); *Warnecke v. MacDonald Construction Co.* 323 F.2d 715, 716 (8 Cir. 1963); *Montgomery Ward & Company v. Steele*, 352 F.2d 822, 830 (8 Cir. 1965)".

In that case there was also a situation where it was contended that there was incompetent evidence admitted. The court said with reference to that at page 389:

"[10] In any event, the rule is well settled that in a non-jury case, the appellate court will not reverse the admission of incompetent evidence unless it appears that all of the competent evidence is insufficient to support the judgment, or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which it would not otherwise have made. *Joseph A. Bass Company v. United States*, supra, p. 845 of 340 F.2d 842, and cases cited; *Skinner v. United States*, 326 F.2d 594, 597 (8 Cir. 1964).

[11] Assuming *arguendo* that the evidence was incompetent, it does not affirmatively appear that such evidence induced, or even influenced Judge Oliver's decision. Moreover the record abounds with competent evidence, which, as we have previously noted, provides adequate support for the court's finding of no liability."

Thus, if there is competent evidence adequate to support the court's finding, whatever else may have happened at the trial ceases to be important.

Appellant does not make sufficiently clear why he claims the findings of the trial court were erroneous for us to determine and argue the issue. However, the decision, far from being "*clearly erroneous*" was correct on the evidence presented.

III.

The True Basis of the Decision.

The pretrial statement including all of its exhibits, the complete record of the evidence including all of the accounting records and the complete findings of the trial court show that the findings are well supported by the evidence.

The factual situation is as follows:

The University of California at its Santa Barbara Campus contracted for the erection of two large buildings. On one building J. B. Allen Company, hereafter called Allen, was the general contractor. On the other building, J. W. Bailey Construction Company hereafter called Bailey, was the general contractor. Each contract was a separate contract with the University.

Each of these contractors, by separate subcontracts, then employed Thompson Electric Co. to perform work as an electrical subcontractor on its building. Thompson had two contracts each with entirely separate contractors.

Valley Electric Company, here called Valley, is a wholesale dealer in electrical goods used in performing the whole of an electrical contractor. Valley Electric, delivered materials on the order of Thompson which were then incorporated into the buildings being erected for the University by Allen and Bailey.

The sequence was; Valley delivered the materials and billed Thompson. Thompson installed the materials and billed the general contractors Bailey and Allen for the materials plus the labor plus Thompson's profit. Each of Bailey and Allen then billed the University for the Thompson work plus any other work that they had done in constructing the buildings.

In due course and after usual delays payment would take place. The University would pay Bailey and Allen and then Bailey and Allen would pay Thompson and then Thompson would pay Valley. In the meanwhile, more work would be done and more obligations would be incurred. Thus at any time the University would owe Bailey and Allen. Bailey and Allen would owe Thompson and Thompson would owe Valley. This is as is usual in building contracts with the money working down from the owner to the supplier of the materials.

Except for its debt to Valley and for a small obligation of Three Thousand Four Hundred Twenty-five Dollars and one cent (\$3,425.01) incurred in March for merchandise supplied by Raber Supply Co., Thompson paid all of its debts through April of 1965. Thompson was not indebted to either Bailey or Allen.

According to the accounts which were made a part of the record, Thompson as of June 10, 1965, showed an account receivable from J. B. Allen Co. of Nine Thousand Two Hundred Fifty-six Dollars and twenty-three cents (\$9,256.23) and showed accounts receivable from J. W. Bailey Construction Co. of Seventeen Thousand Two Hundred Seventy-five Dollars and Eighteen cents (\$17,275.18). These obligations of Bailey and Allen to Thompson arose because Thompson using materials largely supplied by Valley, performed services for Bailey and Allen on the University buildings.

The record also shows that on June 17, 1965, Thompson owed Valley Electric One Hundred Five Thousand Seven Hundred Ninety-four Dollars and eighty-eight cents (\$105,794.88) for materials furnished.

There was testimony that Thompson had dealings at Vandenberg Air Force Base with a person referred to as "Garcia". As a result of these dealings he had suffered losses and these losses caused him to be unable to complete his work on the University buildings.

In late May or early June, 1965, Thompson informed Bailey and Allen and Valley that he would be unable to complete his contracts.

Upon Thompson's announcing his inability to pay his bills and complete his work, Valley filed stop notices with the University and the University withheld payment as required by the stop notice law.

As a result of Thompson's breach of his contract each of Bailey and Allen had to find others to perform their electrical work. This created the ordinary breach of contract situation with unliquidated and completely contingent possibility of obligation from Thompson to Bailey and Allen because of the breach.

An involuntary petition of bankruptcy of Thompson Electric Company was filed on June 10, 1965, with Bailey and Allen as the principal creditors seeking the bankruptcy and one other small creditor joined in the petition. Thompson Electric Company was adjudged a bankrupt on June 29, 1965, on the basis of that involuntary petition. The bankrupt thereafter filed its schedules stated to be as of final accounting dated June 17, 1965. The schedules did not list either Bailey or Allen as creditors but did list Valley Electric Company as a creditor to which the bankrupt was indebted in the amount of One Hundred Five Thousand Five Hundred Seventy-three Dollars and fifty-seven cents (\$105,573.57) out of a total debt of One Hundred Twenty-one Thousand Two Hundred Twenty-two Dollars and

thirty-three cents (\$12,222.33). The schedules showed that the bankrupt held choses in action totalling Twenty-six Thousand Nine Hundred Seventy-six Dollars and fifty-two cents (\$26,976.52). The detail of that Twenty-six Thousand Nine Hundred Seventy-six Dollars and fifty-two cents (\$26,976.52) is incorporated in Exhibit "O" attached to the pre-trial statement which shows that there was owed to J. B. Allen and Company on June 10, 1965, Nine Thousand Two Hundred Fifty-six Dollars and twenty-three cents (\$9,256.33) and by J. W. Bailey Construction Company, Seventeen Thousand Two Hundred Seventy-five Dollars and eighteen cents (\$17,275.18). No debt to either Bailey or Allen at that date was shown.

On or about July 22, 1965, Bailey agreed to pay Fifty-five Thousand One Hundred Ninety-one Dollars and two cents (\$55,191.02) to Valley upon Valley releasing its stop notice. The amount was to be paid Twenty Thousand One Hundred Ninety-one Dollars and two cents (\$20,191.02) on July 22, 1965, and Seven Thousand (\$7,000.00) per month thereafter until the full amount was paid. Upon the agreement being made, Valley released its stop notice and the University then paid to Bailey all amounts which had been held by virtue of that stop notice.

On November 18, 1965, Allen paid to Valley the sum of Twenty-five Thousand Five Hundred Dollars (\$25,500.00) in return for release by Valley in full of its stop notice of Thirty-three Thousand Four Hundred Sixty Dollars and ninety cents (\$33,460.90). The stop notice was then released and Allen was paid by the University. The difference between the Twenty-five Thousand Dollars (\$25,000.00) and the Thirty-three Thousand Four Hundred Sixty Dollars and ninety

cents (\$33,460.90) was a negotiated discount for cash and for the agreement of Allen that it would not participate in making any claim against Valley that payments to Valley resulted in preference to Valley in the manner claimed in this action.

On August 26, 1965, Bailey filed its proof of claim in bankruptcy seeking recovery of Fifty-eight Thousand Seven Hundred Twenty-seven Dollars and ninety-seven cents (\$58,727.97). That claim appears to have been largely based upon its payment to secure the release of the Valley stop notice although it also did refer to failure of the bankrupt to perform its subcontract and to the fact that the claimant had been forced to employ another electrical subcontractor with possible additional costs.

Proof of claim in bankruptcy was filed by Allen on August 26, 1965, apparently being based directly upon the Valley stop notice of Thirty-three Thousand Four Hundred Sixty Dollars and ninety cents (\$33,460.90) which was later released to Allen upon the payment of Twenty-five Thousand Dollars (\$25,000.00). Allen also referred to the failure of the bankrupt to perform its subcontract and the necessity of employing another electrical subcontractor.

Upon Valley Electric's stop notice claims being paid, it made no claims in bankruptcy so while it was the principal creditor with a debt of One Hundred Five Thousand Five Hundred Seventy-three Dollars and fifty-seven cents (\$105,573.57) from Thompson to it, it was not a claimant in the bankruptcy.

The Schedules attached to the pre-trial statement show that if the claim of Valley is excluded the assets of Thompson exceeded its liabilities.

IV.

The Effect of the Stop Notices.

The stop notices filed by Valley were direct claims directed to the University and seeking payment from the University to Valley. They did not make Bailey and Allen creditors of Thompson. They did not establish the amount of any claim that Bailey and Allen might have against Thompson.

Under the stop notice law the University would pay directly to Valley an amount equal to the amount owed to Valley for goods furnished by Valley and incorporated in the University buildings. While it is true that the amounts thus paid would then have been deducted from payments from the University to Bailey and Allen, the filing of the stop notices created no debt from Thompson to Bailey and Allen. Payment to Valley by the University or by Bailey and Allen was not a payment by Thompson and could not result in a claim of preferential payment by Thompson to Valley. A similar situation was considered in *Keenan Pipe and Supply Company v. Shields*, 241 F. 2d 486. That case discusses the public policy protecting a materialman furnishing material to public works. The policy is stated in that case at page 489:

“The public policy to have the laborer and materialman paid for public works jobs is much stronger

than that which underlies legislation to protect such parties on private projects, by which each is given a mechanic's lien which attaches from the time the labor or material goes into the project. But the rationale of all such legislation is the same. Therefore, a payment either by a principal contractor or a subcontractor to a materialman can be held valid either on the ground that the materialman surrendered his right to file a lien or, as here, the Stop Notice, and received the payment as present consideration therefor or, on the other hand, that a valid contract had been made between the parties, the contractor, the subcontractor and the materialman whereby the materialman gave up his right to file the Stop Notice and the contractor and subcontractor agreed that, as a consideration therefore, the checks should be given to him."

The court also said in that case at page 490:

"[5] The finding that Keenan, as a creditor, was enabled to obtain a greater percentage of his debt than some other creditor of the same class is erroneous as to such a payment, because no other creditor is shown to have been in that same position. Many months before the petition in bankruptcy was filed, Keenan was in a preferred position. The contractor was under obligation to pay for all material Keenan had furnished for the state project, and Keenan had a right to file the Stop Notice if the payment was not made. No other creditor is shown to have been in that position."

V.

The Claims of Bailey and Allen.

On June 10, 1965, Bailey owed Thompson Seventeen Thousand Two Hundred Seventy-five Dollars and eighteen cents (\$17,275.18) and Allen owed Thompson Nine Thousand Two Hundred Fifty-six Dollars and twenty-three cents (\$9,256.23). Thompson had announced his breach and Valley had filed its stop notices.

Bailey and Allen could pay Valley for materials furnished to their job or if they did not, the University would pay and deduct the amount paid from payments to Bailey and Allen. On June 10, 1965, neither Bailey nor Allen, nor the University had made payments however.

Bailey and Allen had to secure others to perform Thompson's work. They, however, would be relieved of their obligation to pay Thompson for work already billed and possibly for materials delivered and work done but not yet billed. In any event their only claim against Thompson would arise if there were extra cost to them from hiring others to do the work after crediting to Thompson any amounts due to him for work done and billed plus work and materials furnished by him and possibly not billed. The amount of loss to Bailey and Allen, if actually there was to be a loss could not be determined until there was a determination of the charge of the new contractor and a comparison of that with the contract price of Thompson for the same work. There may have been no loss to Bailey and Allen. We cannot tell until the whole account is stated.

In any event, Bailey and Allen had received and incorporated into their buildings built for the University

the materials supplied by Valley which were the basis of the stop notices filed by Valley. Presumptively the billing to the University affected by the stop notices included billing for materials supplied by Valley.

The petition in bankruptcy filed by Bailey and Allen and their claims filed in the bankruptcy were for the amounts claimed by Valley in its stop notices to the University. Yet on June 10, 1965, when the petition was filed and even at the time the claims were filed, Bailey and Allen had not been out the money claimed by them. The validity of the claims of the creditors is important when it is claimed that another creditor has been given a preference. Here, however, no valid claims were shown.

The stop notices were not indicative of the amount of any debt of Thompson to Bailey or Allen. That was a direct claim by Valley to the University which may or may not have resulted in a loss to Bailey and Allen which would give them a claim against Thompson.

The burden of proof was upon the Plaintiff Bumb to show that there was an insolvency resulting in bankruptcy and that there was an unlawful preference of Valley over other creditors. The fact that claims had been allowed in the bankruptcy proceedings, to which Valley was not a party, in no way established, for the purposes of this action, the validity of those claims. There were no other creditors at the time when Valley received the payments objected to. That at some later

time claims were filed by others and allowed in the bankruptcy showed neither the validity of those claims nor any preference of Valley over those later claimants.

What appears to have happened is that Bailey and Allen in order to get their money from the University settled with Valley so that Valley would release its stop notices. Now having done so they, using the trustee in bankruptcy as their tool, are trying to get back from Valley the same money that they paid to Valley in settlement. Valley abandoned its claim to One Hundred Five Thousand Dollars (\$105,000.00) upon being paid a substantially smaller sum on its stop notices. Now Bailey and Allen as the principal creditors of Thompson, using claims not shown to have any basis are trying to get money from Valley in the hope of recovery of that which was paid to Valley.

Valley was a secured creditor having a mechanic's lien or stop notice right, public policy has established the desirability that materialmen furnishing materials for public buildings be protected. If, upon payment of the amounts covered by their lien rights (or stop notice rights), the amounts could then be recovered from them that policy would be defeated.

Actually Bailey and Allen were never proven to be creditors of Thompson. Valley abandoned its claim. With those amounts deducted Thompson was not insolvent. There could not therefor have been an unlawful preference.

VI.

**Collateral Attack Upon the Adjudication
in Bankruptcy.**

Appellant argues that the adjudication in bankruptcy cannot be collaterally attacked. Appellant also argues that it is immaterial whether or not Allen and Bailey were valid petitioning creditors.

The attack upon the adjudication in bankruptcy was not essential to the decision in the trial court. It is, therefore, not a basis for appeal and really immaterial here whether or not there could be a collateral attack. It is well to note, however, that the position of appellant appears to be that Allen and Bailey, who were not then in fact creditors, by filing a petition which was in fact without basis, and by securing the "*consent*" of the debtor could establish a bankruptcy and gain rights against other creditors, yet they argue that these other creditors could not, had they desired to do so, have had any place in the bankruptcy proceeding.

While it is an apparent misuse of the bankruptcy procedure to establish a bankruptcy here we, because the issue is unnecessary do not base our position upon that issue.

If respondents were and are precluded from attacking the validity of the bankruptcy order either at the time when it was made or in these proceedings because it is collateral to these proceedings, by the same reasoning whatever happened in the bankruptcy has no bearing here. That there were claims filed against the bankrupt estate and that the trustee may have liquidated all assets has no probative effect here, for if wholly collateral so that appellee cannot attack what went

on in the bankruptcy, the bankruptcy cannot create rights against the appellee.

On page 18 of appellant's brief, it is argued that the trustee has liquidated all assets of the bankrupt and has on hand Eleven Thousand Dollars (\$11,000.00). Yet we know that at the time when the petition in bankruptcy was filed Bailey and Allen owed the bankrupt Twenty-six Thousand Nine Hundred Seventy-six Dollars and fifty-two cents (\$26,976.52). If that was collected the assets would exceed Eleven Thousand Dollars (\$11,000.00). We had no explanation.

Bailey and Allen had claims of Ninety-two Thousand One Hundred Eighty-eight Dollars and eighty-seven cents (\$92,188.87) stated by them to be based upon the Valley stop notices. Those would be a substantial part of the One Hundred Sixty-nine Thousand One Hundred Twenty-nine Dollars and seventy-six cents (\$169,129.76) in claims. Were those claims contested? If not, why not? What was the basis of the other claims only a few of which were shown in the bankrupt's schedules.

We know that when Bailey and Allen settled with Valley the stop notices were released so that Bailey and Allen were paid by the University as much or more than they had paid to Valley. That left them with only the wholly contingent claim against the bankrupt depending entirely for its amount upon a determination of the loss to them because of being required to secure others to do the work. If the Twenty-six Thousand Nine Hundred Seventy-six Dollars and fifty-six cents (\$26,976.56) owed by them to Thompson were in some manner paid or forgiven, no one has shown the details on that.

While it may be argued that the "adjudication" in bankruptcy cannot be collaterally attacked, it would not follow that the validity of the claims of petitioning creditors could not be collaterally attacked. Here the burden was upon the plaintiff to prove that there were persons with valid claims other than appellee and that appellee by the payments made to it was preferred to those others. At the trial appellant wholly overlooked this obligation of proof. The trial judge was persuaded by the appellant's own evidence (and lack of evidence) that there was no preference. This was in part because there was a complete failure to prove that there were persons with valid claims entitled to claim that there had been a preference of appellee over them.

VII.

Conclusion.

Appellant offers no legal basis for appeal. His contention appears only to be that the findings are not supported. He has avoided discussion of the evidence supporting the decision of the Court. He has applied false tests of the obligation of the claimed bankrupt.

Not only is it not true that the findings were clearly erroneous but it is true that any finding other than that made by the Court would have been "*clearly erroneous*".

Respectfully submitted,

WILLIAM T. SELBY,

Attorney for Appellee.

JUL 10 1968

NO. 22683

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TY OF SELDOVIA and ABE (T-11)
OMAS,
Appellants, (T-11)
vs.
EMPLOYERS' LIABILITY ASSURANCE
CORPORATION, LTD.,
Appellee.

FILED

JUL 16 1968

WM. B. LUCK, CLERK

BRIEF FOR APPELLEE

HUGHES, THORSNESS, LOWE,
GANTZ & CLARK
807 G Street
Anchorage, Alaska 99501

Attorneys for Appellee
Employers' Liability
Assurance Corporation, Ltd.

By: Robert C. Erwin



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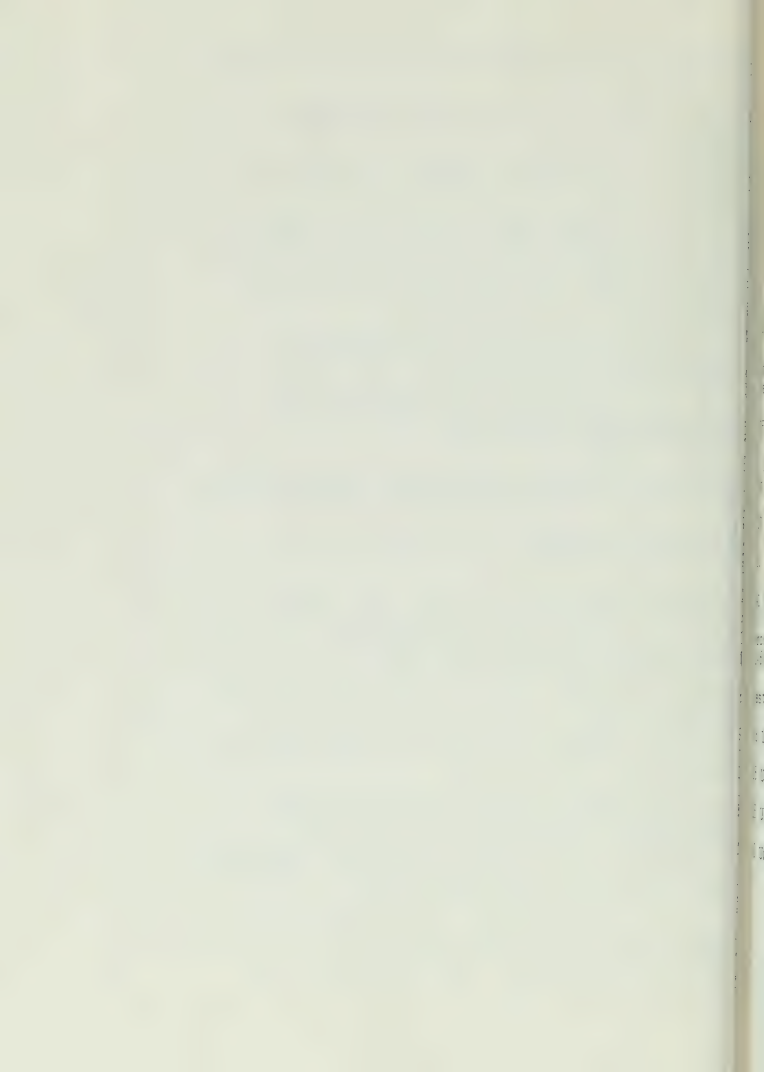
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CASES CITED:

<u>Anna Casualty & Surety Co. of Hartford, Conn.</u> <u>Martin</u> , 377 S.W.2d 583, 585 (Ky. 1964)	20
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5 California Law Review 1053 (1967) 14

Federation of Insurance Counsel Quarterly, 18
n page 822. 24

3 Insurance Counsel Journal 33, 37 (1956) 45

6 Insurance Counsel Journal, page 585 25

1 Minnesota Law Review 764 (1967) 14

rosser on Torts, Section 12 on page 60 (3rd Ed.
964) 44

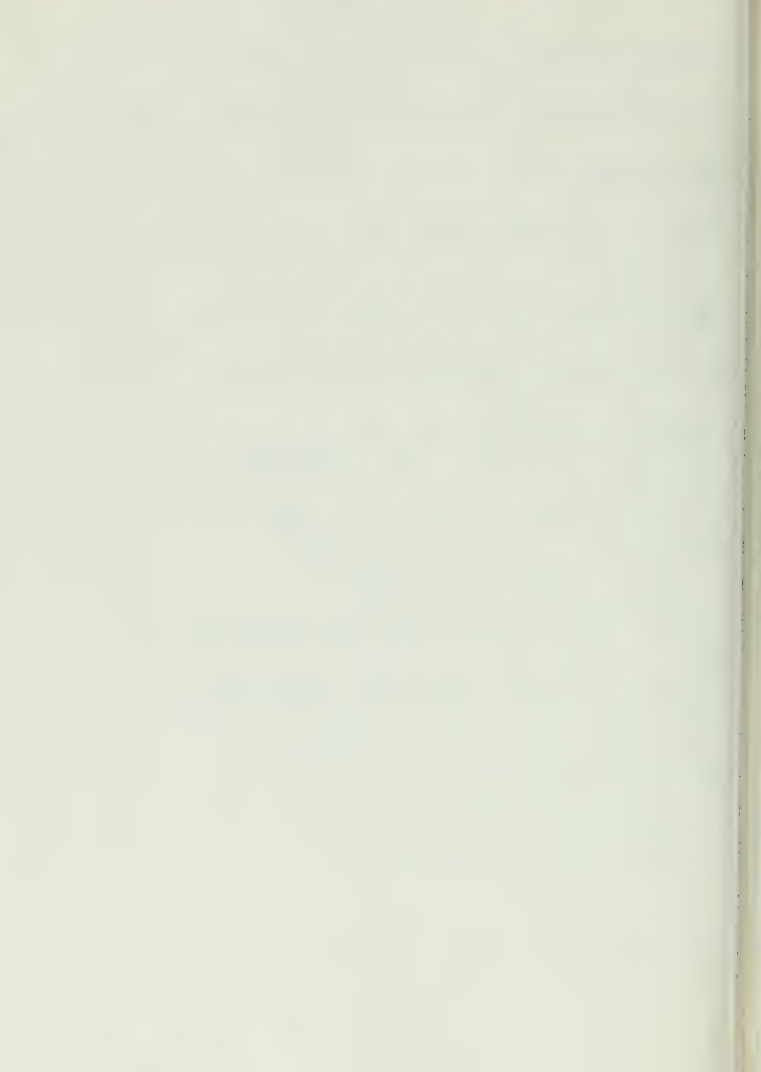
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8 United States Code Annotated 1924 1

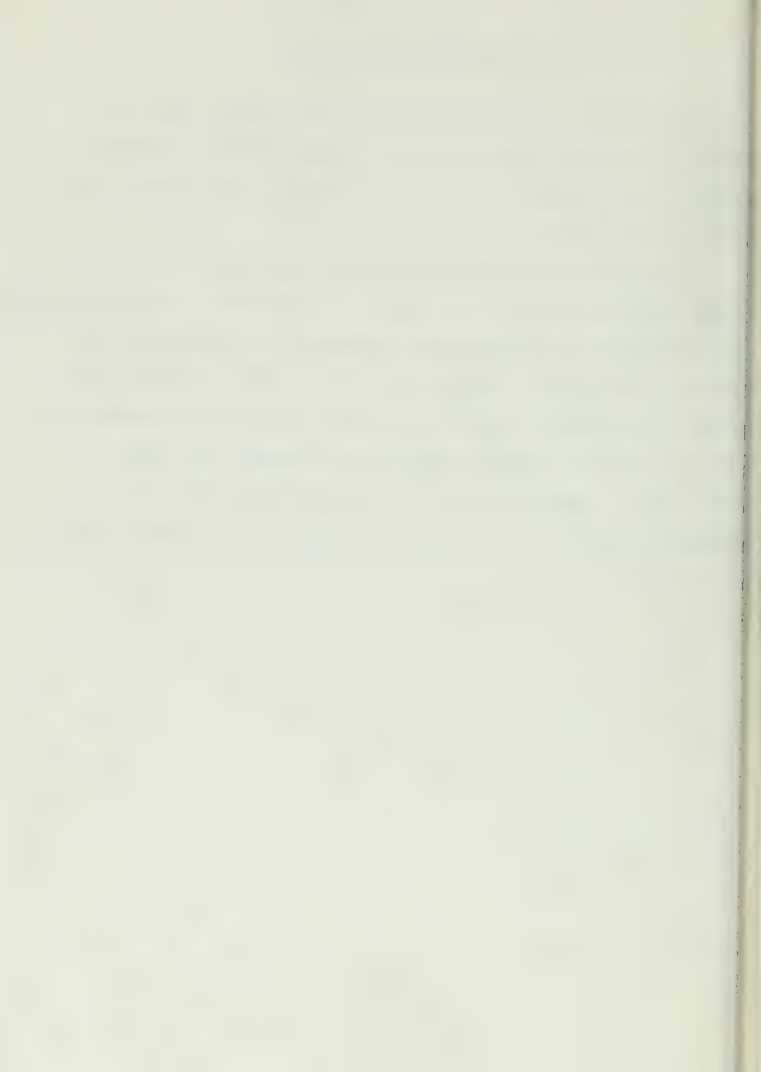
8 United States Code Annotated 2201 1



JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit has jurisdiction to review final decisions in civil actions from the United States District Court for the District of Alaska (28 U.S.C.A. 1291, 1294).

The suit in question herein was a declaratory judgment brought pursuant to 28 U.S.C.A. 2201 and 1332 and was based on diversity of citizenship and an amount in controversy in excess of \$10,000.00. (Complaint R 2, 3, 75A - Answers 62, 63, 110-111, R 185). The decision was rendered on November 28, 1966 and a formal decision entered on November 30, 1966. (R 237-241). Appellants notice of appeal was filed on December 28, 1966 (R 250) within the time limits set by this Court.



STATEMENT OF CASE

On September 19, 1965, Abe Thomas, Police Chief for the City of Seldovia arrested Charles Ramon McEwen for certain offenses (R 171-173). In the process of such arrest Charles Ewen was shot in the abdomen necessitating hospitalization at Providence Hospital at Anchorage, Alaska (R 63, Par. VI, 3, 154).

As a result of the incident in question, Charles McEwen filed a claim against the City of Seldovia on December 13, 1965 (R 198), and said claim was forwarded to Preferred General Agency of Alaska, Inc., as agents for appellee (R 198). In answer to the letter forwarding the claim, Mr. T. H. Reed, Superintendent of the Alaska Claims Office for appellee sent the following letter on December 22, 1965 (R 199-200) to the attorneys for the City of Seldovia:

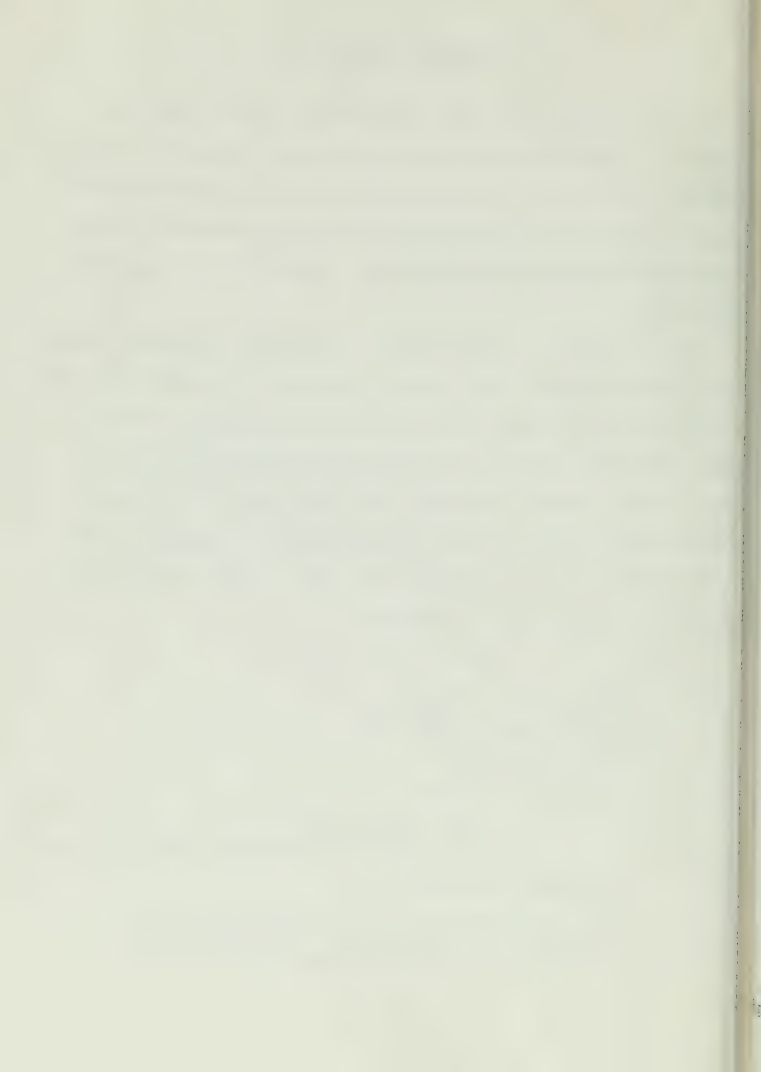
"December 22, 1965

Mr. John E. Havelock
Seldovia City Attorney
Guess, Rudd & Havelock
Attorneys at Law
P. O. Box 1332
Anchorage, Alaska

Re: 0-122302-A
Charles McEwen vs. City of Seldovia

Dear Mr. Havelock:

Mr. Hartman of Preferred General Agency has forwarded your letter and claim against the City to this office for handling.



The Employers' Liability Assurance Corporation, Ltd. does not waive any rights under the terms of the policy number E35-2049-81 issued to the City of Seldovia.

Among other rights that the Employers' Liability Assurance Corp., Ltd. may have by investigating or defending a lawsuit, the company does not waive any right to disclaim coverage on the grounds that the injury complained of was caused intentionally by or at the direction of the insured, or that the allegations do not fall within the scope of coverage.

By the very nature of the claim, the acts alleged consist of false imprisonment, unlawful arrest and assault and battery which come within the standard definition as set forth in policy exclusions Section "O" which specifically provides -

(O) Under coverage A, B, and C to
bodily injury or injury or destruction
of property caused intentionally by or
at the direction of the insured.

It is further noted that the claim sets forth a prayer for \$200,000 which is greatly in excess of the City of Seldovia policy limits of \$5,000.00. Please be advised that this letter will serve as notice of the excess.

In the event of a judgment in excess of policy limits or a verdict for damages not falling within the scope of coverage the City of Seldovia will be held liable for any and all amounts over and above the limits and provisions of policy #CLE35-2049-81.

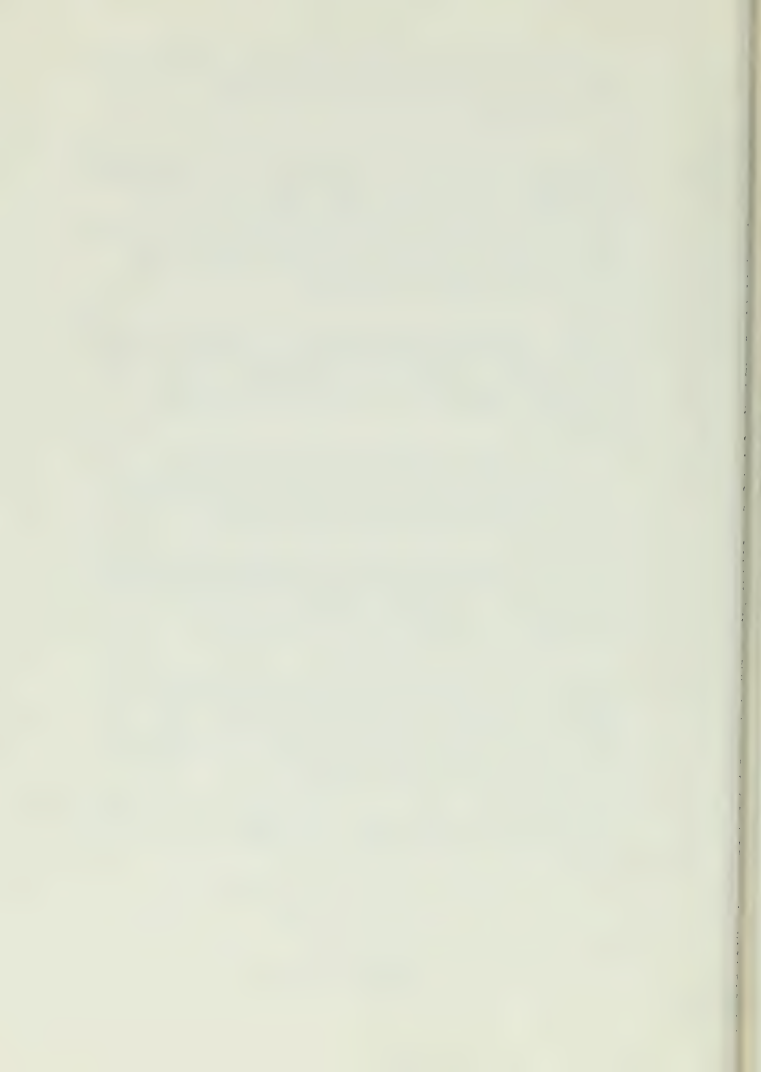
The Employers' Liability Assurance Corp., Ltd. and their attorneys will be happy to cooperate with you.

Very truly yours,

S/T. H. Reed

T. H. Reed
Superintendent

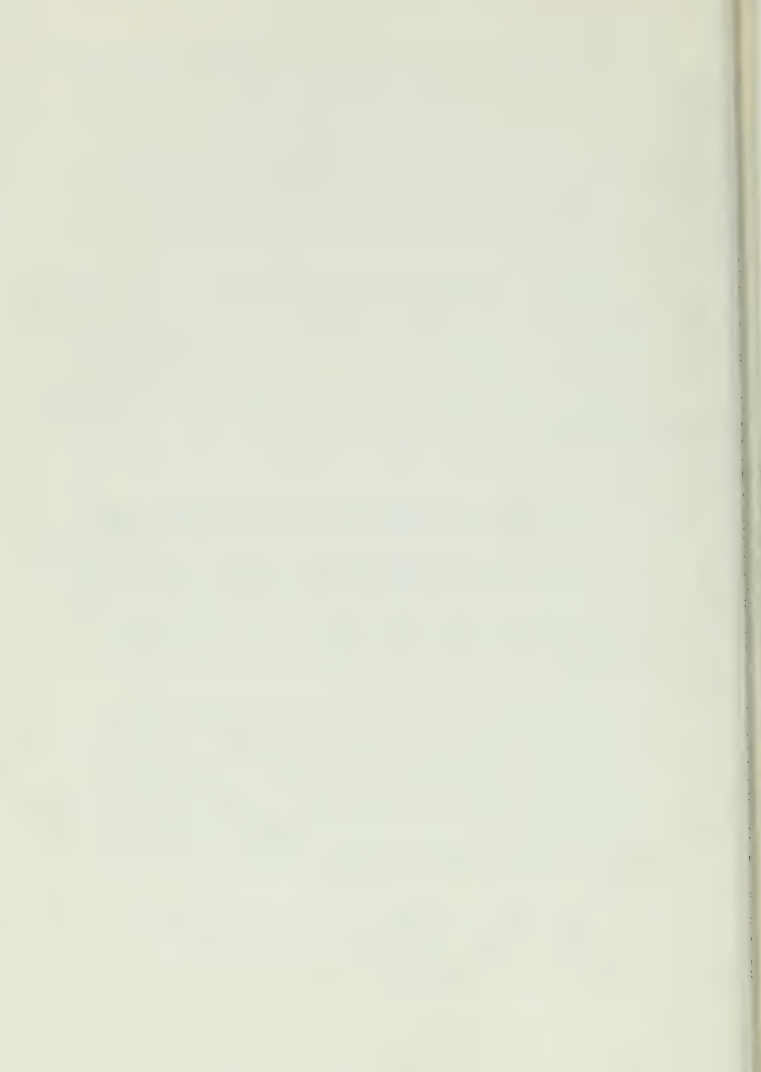
R:ged"



The next correspondence from the attorneys for the City of Seldovia was a letter dated March 16, 1966 (R 201) which enclosed a copy of the summons and complaint of Charles Ewen against the City of Seldovia and Abe Thomas filed in the Superior Court for the State of Alaska, Third Judicial District (R 201).

The complaint had been filed on December 13, 1965 (R 185) and had been served on the City of Seldovia on December 28, 1965 (R 185). The City of Seldovia filed answer to the complaint on January 17, 1966 (R 185, 224) and participated in the following discovery procedures before notifying appellee that the suit had been filed:

1. Attended the deposition of Abe Thomas taken by attorneys for McEwen on January 31, 1966 (R 142).
2. Attended the deposition of Richard Wolf taken by attorneys for McEwen on March 3, 1966 (R 142).
3. Attended the deposition of Jack R. Simpson taken by attorneys for McEwen on March 7, 1966 (R 142).
4. Did not contest in any way a motion for inspection and copying 'all written statements of witnesses to the occurrence which is the subject matter of the complaint including any and all written statements of the defendants or the plaintiff which may be in the possession of the defendants . . . including photographs and diagrams of the scene,' filed on February 25, 1966 and granted by the Superior Court on March 10, 1966' (R 209-211).
5. Attended the deposition of Doris Fleck medical records librarian at Providence Hospital, taken by attorneys for McEwen on March 7, 1966 (R 185).



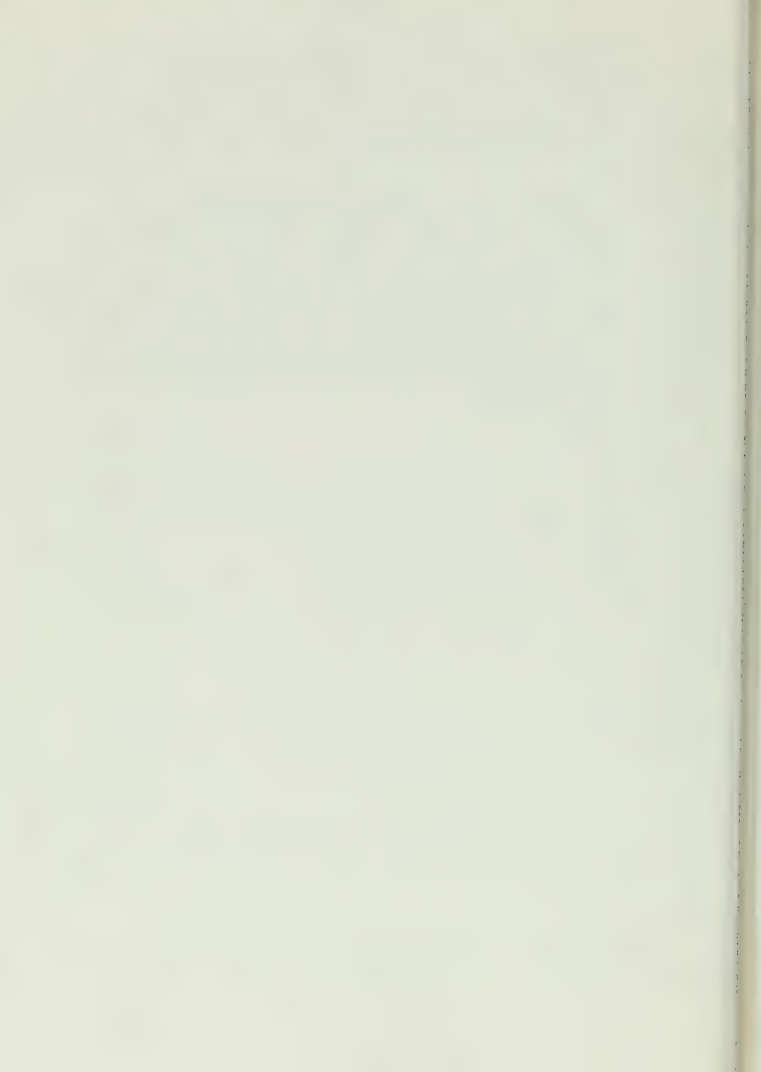
6. On March 31, after sending the letter of March 16 to appellees concerning the suit in question, appellant stipulated with attorneys for plaintiff, McEwen, to take the deposition of Charles McEwen at Salt Lake City, Utah on April 9, 1966 (R 187, 225).

7. Notice of the taking of depositions, together with subpoenas for appearances were served on witnesses Bryant, Brewster, Knight, Charlotte, Eaulsos and Reardon for March 9 and 10 at Seldovia, Alaska but such depositions were not taken because bad weather prevented the attorneys from getting to Seldovia, Alaska (R 226). However, the investigator working on behalf of McEwen did discuss the case with the witnesses Bryant, Brewster and Reardon at the time of service of said papers on March 1, 1966 (R 226).

The Declaratory Judgment action in the case at bar was commenced on June 1, 1966 (R 8) and the litigation herein progressed through preliminary stages until appellant moved for summary judgment on November 8, 1966 (R 145-156). Appellee then filed a cross-motion for summary judgment (R 158-187) and the matter came on for hearing on December 2, 1966.

The court denied both motions for summary judgment on December 9, 1966 (R 212) and set the case down for pretrial conference on motion from appellee (R 213-215, 218-220). At informal conference held in lieu of the pretrial conference (R 221) the parties indicated that an agreed state of facts had been arrived at and the case would be resubmitted to the court for decision (R 222).

Subsequently, on June 26, 1967 a "stipulation of facts" was filed with the court concerning the facts of the case



R 223-226). Subsequently, on November 28, 1967, the District Court rendered a Memorandum of Decision and Order as follows: R 237-239).

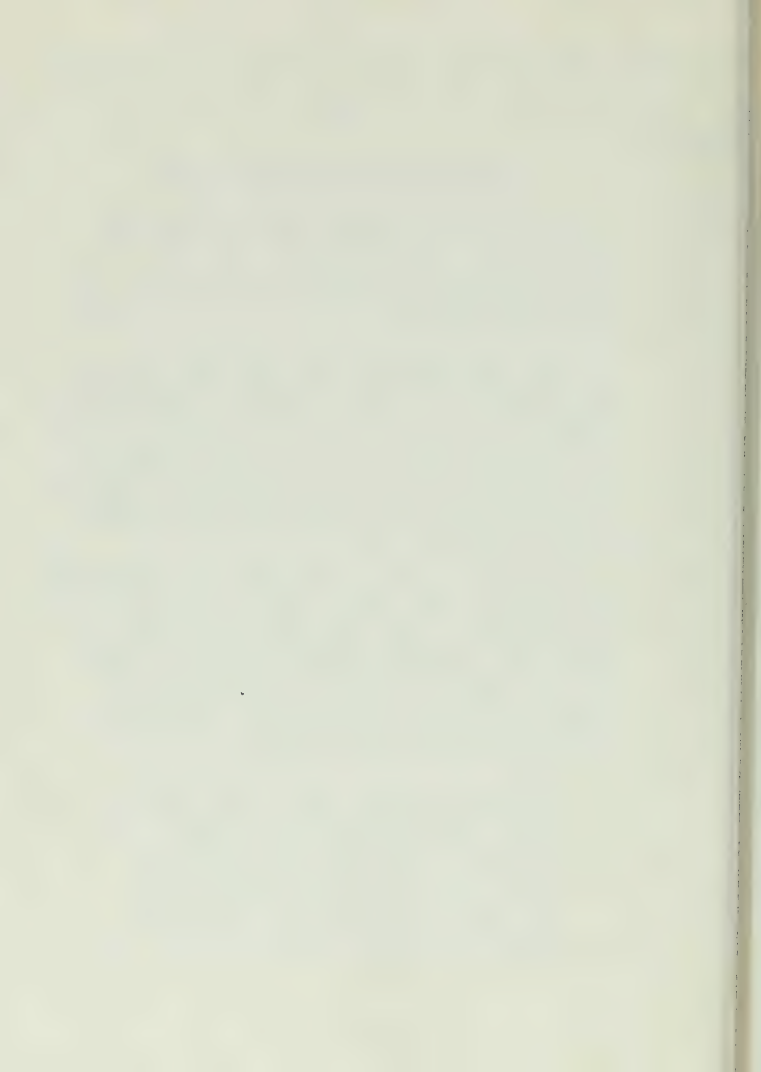
"MEMORANDUM OF DECISION AND ORDER

In the above entitled matter, the parties filed cross motions for summary judgment which were denied by the court on December 9, 1966. Subsequently, a stipulation of facts was filed and by agreement of counsel the matter was submitted for decision on the record and the stipulation of facts.

After due consideration, the court finds that the letter of September 27, 1965, from the City of Seldovia to Providence Hospital, and the letter dated October 12, 1965, from Mr. Occhipinti to the City of Seldovia, did not constitute a denial of coverage. The letter from the attorney for the City of Seldovia dated December 13, 1965, to Mr. Hartman of Preferred General Agency clearly indicates that the city did not then consider that coverage had been denied.

Mr. Reed's letter of December 22, 1965 to the attorneys for the City of Seldovia is not a denial of coverage. The letter merely contains a reservation of rights and gives notice of the fact that the amount claimed was far in excess of the limits of the coverage provided by the policy issued to the City. The defendant's claim of a denial of coverage is entirely inconsistent with the following statements recited in the December 22 letter:

'Among other rights that the Employers' Liability Assurance Corp., Ltd. may have by investigating or defending a lawsuit, the Company does not waive any right to disclaim coverage on the grounds that the injury complained of was caused intentionally by or at the direction of the insured, or that the allegations do not fall within the scope of coverage.' * * *



'The Employers' Liability Assurance Corp., Ltd. and their attorneys will be happy to cooperate with you.'

The complaint in the State Superior Court case was filed on December 13, 1965. On January 17, 1966, the City filed an answer to the complaint. Notice of the suit was not given to the Company until March 16, 1966.

Condition No. 10 contained in the policy provided as follows:

'10. NOTICE OF CLAIM OR SUIT. If claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.'

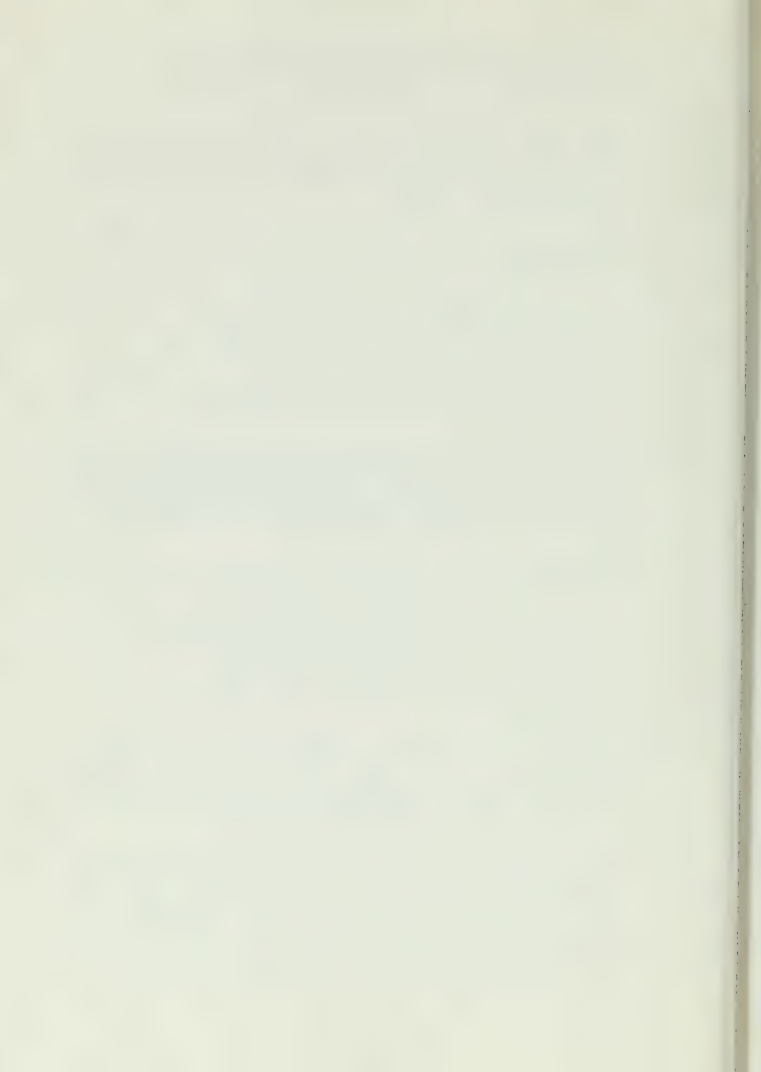
Summons or other process received by the City in connection with the action commenced in the State Superior Court was not immediately forwarded to the Company within the meaning of Condition 10 set forth above.

Condition 12 of the policy provides:

'12. ACTION AGAINST COMPANY. No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, * * *'

Plaintiff did not by its actions, or otherwise, waive any of its rights under the policy. To the contrary, all rights were specially reserved by its letter of December 22, 1965 addressed to the attorneys for the City of Seldovia.

On the basis of the reasoning and authorities contained in plaintiff's memo in opposition to defendants' motion for summary judgment and in support of plaintiff's motion for summary judgment filed November 10, 1966, plaintiff is entitled to summary judgment as a matter of law and defendants' motion for summary judgment must be denied.



Within ten (10) days, plaintiff will prepare, serve and submit to the court a proposed form of summary judgment.

It is so ORDERED.

S/Raymond E. Plummer
United States District Judge

DATED: Nov. 28, 1967"

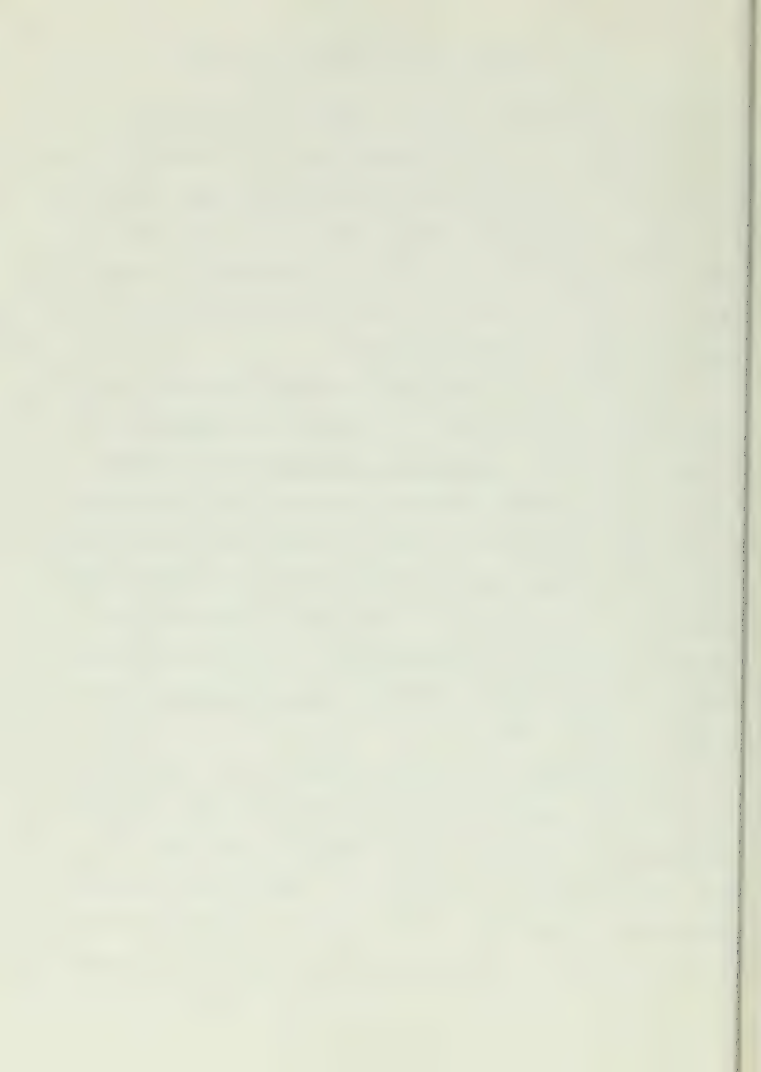
After formal judgment was signed, this appeal followed.

SUMMARY OF ARGUMENT

The basis for Appellant's argument is the contention that the Reservation of Rights letter sent on December 22, 1965 is in reality a refusal to defend which waived any obligation of the City of Seldovia to forward suit papers, etc. when served and further permitted the City of Seldovia to actively defend the lawsuit in question unless the appellee could establish prejudice from such actions.

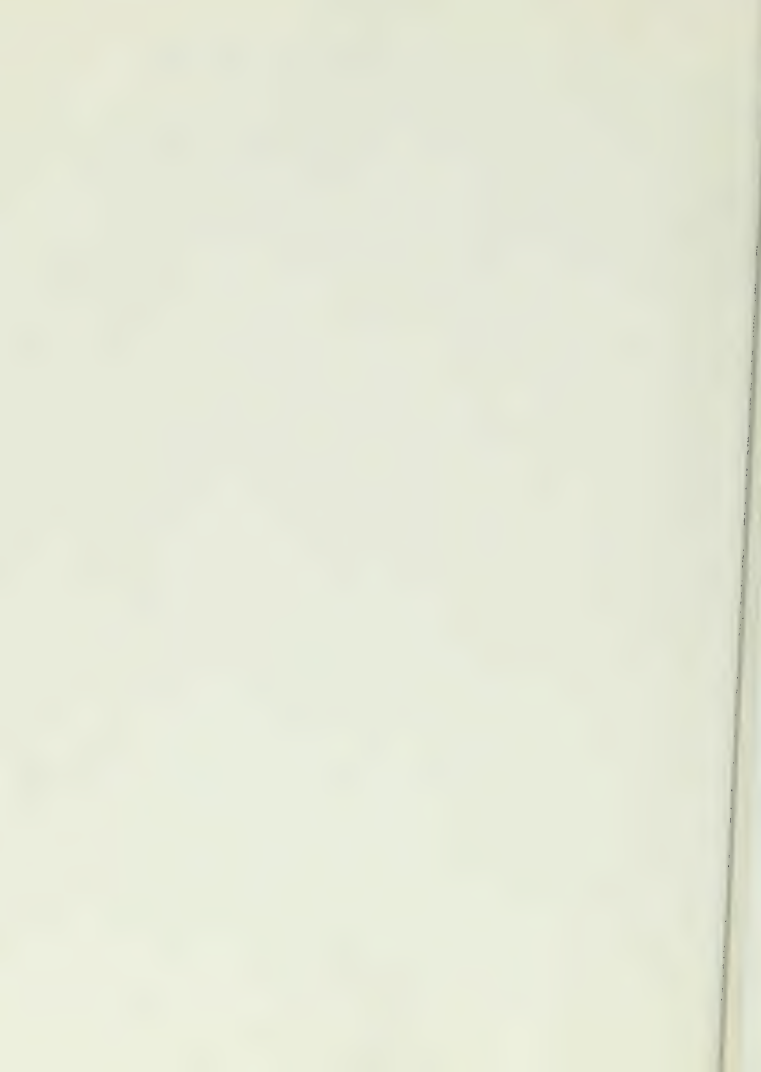
The trial court found that the letter was not a refusal to defend and such a decision is binding herein because it is not clearly erroneous - Lundgren v. Freeman, 307 F.2d 104, 44-115 (9th Cir. 1962). Further the trial court determined that the law to be applied in this diversity case in the absence of a controlling Alaska decision would eliminate a need to show prejudice for a violation of a condition of the policy, and it is submitted that this finding as to local law is binding because it is not clearly erroneous. Owens v. White, 380 F.2d 100, 315 (9th Cir. 1967).

The undisputed and stipulated facts show a failure to forward the suit papers from December 28 until March 16 and establish that in the intervening period the Appellant filed an answer, participated in the taking of 4 depositions and agreed to produce all documentary evidence in the case without limit. This constituted a violation of both the condition to forward



uch papers immediately and the cooperation clause and
entitled Appellee to summary judgment herein.

Additionally the original complaint against appellant
erein alleged events outside the coverage of the policy and
us there was no wrongful failure to defend the lawsuit
against the City of Seldovia.



ARGUMENT

ARGUMENT IN ANSWER TO CONTENTION OF APPELLANTS THAT APPELLEE WAIVED ANY REQUIREMENT OF FORWARDING SUIT PAPERS TO COMPANY BY SENDING THEM A RESERVATION OF RIGHTS LETTER.

The entire argument of the City of Seldovia herein is based upon the premise that the letter of December 22, 1965 is a refusal to defend under the policy of insurance and thus waived compliance with the conditions of the policy. The letter itself is set forth completely herein to show that while it may contain a reservation of rights, the letter is not a refusal to undertake the defense, and any such interpretation by the City of Seldovia is not warranted by the letter itself: (R 165-166, 230-231).

"Mr. John E. Havelock
Seldovia City Attorney
Guess, Rudd & Havelock
Attorneys at Law
P. O. Box 1332
Anchorage, Alaska

Re: 0-122302-A
Charles McEwen v. City of Seldovia

Dear Mr. Havelock:

Mr. Hartman of Preferred General Agency has forwarded your letter and claim against the City to this office for handling.

The Employers' Liability Assurance Corporation, Ltd. does not waive any rights under the terms of policy number E35-2049-81; issued to the City of Seldovia.

Among other rights that the Employers' Liability Assurance Corp., Ltd. may have by investigating or defending a lawsuit, the

company does not waive any right to disclaim coverage on the grounds that the injury complained of was caused intentionally by or at the direction of the insured, or that the allegations do not fall within the scope of coverage.

By the very nature of the claim, the acts alleged consist of false imprisonment, unlawful arrest and assault and battery which come within the standard definition as set forth in policy exclusions Section "O" which specifically provides -

(O) Under coverage A, B, and C to bodily injury or injury or destruction of property caused intentionally by or at the direction of the insured.

It is further noted that the claim sets forth a prayer for \$200,000 which is greatly in excess of the City of Seldovia policy limits of \$5,000.00. Please be advised that this letter will serve as notice of the excess.

In the event of a judgment in excess of policy limits, or a verdict for damages not falling within the scope of coverage the City of Seldovia will be held liable for any and all amounts over and above the limits and provisions of policy #CLE35-2049-81.

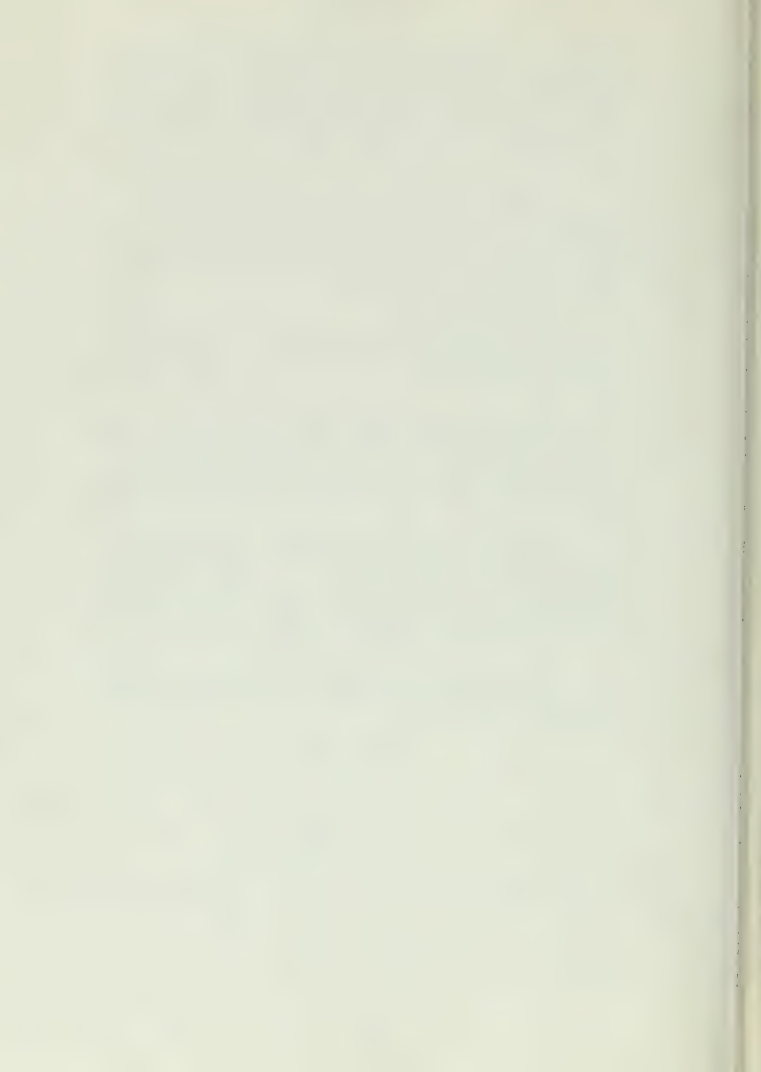
The Employers' Liability Assurance Corp., Ltd., and their attorneys will be happy to cooperate with you.

Very truly yours,

s/ T. H. Reed

T. H. Reed
Superintendent"

Appellant, City of Seldovia, appears to be unfamiliar with the need for a Reservation of Rights letter by an insurance company in a case where there may be a problem of



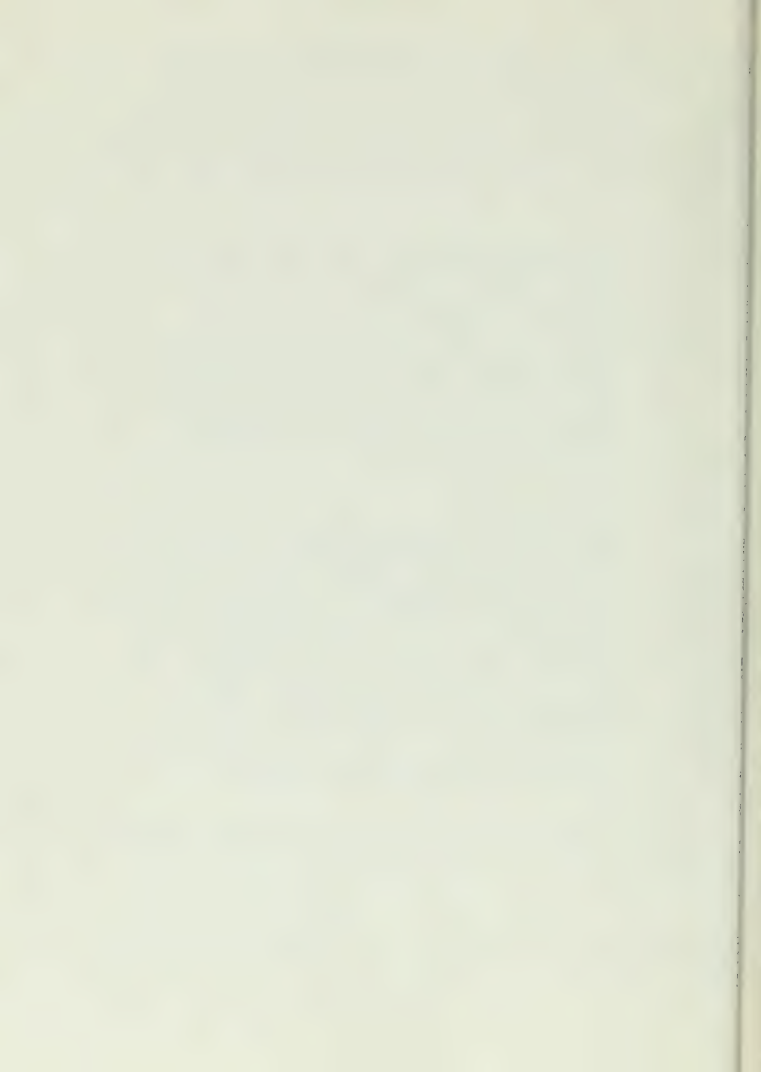
insurance coverage, but the great weight of authority clearly supports the proposition that if the company undertakes the defense of a cause of action without reserving any question of coverage, any policy defenses are deemed waived. 38 A.L.R. d 1148.

"The law on the point under annotation may be summarized briefly. The general rule is this: a liability insurer, by assuming the defense of an action against the insured, it is thereafter estopped to claim that the loss resulting to the insured from an adverse judgment in such action is not within the coverage of the policy, or to assert against the insured some other defense existing at the time of the accident.

* * *

The general rule of estoppel is also limited by the principle that a liability insurer may avoid the operation of the rule by giving the insured timely notice that, notwithstanding its defense of the action against him, it has not waived the defenses available to it against the insured. Such notice, to be effective, must fairly inform the insured of the insurer's position, and must be timely, although delay in giving notice will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense." (pp. 1150 and 1151).

If the letter from Tom Reed is construed according to its written language as a reservation of rights letter which does not deny coverage, then the actions of the defendant, City of Seldovia, must be considered as a breach of the contract between plaintiff and defendant, City of Seldovia, and as a



matter of law the plaintiff was entitled to summary judgment under the provisions of Rule 56(a) of the Federal Rules of Civil Procedure.

In his memorandum of decision, Judge Plummer held that the Reed letter was not a denial of coverage and found as follows: (R 238).

"Mr. Reed's letter of December 22, 1965 to the attorneys for the City of Seldovia is not a denial of coverage. The letter merely contains a reservation of rights and gives notice of the fact that the amount claimed was far in excess of the limits of the coverage provided by the policy issued to the city. The defendant's claim of a denial of coverage is entirely inconsistent with the following statements recited in the December 22 letter: (quote omitted)."

It is submitted that this finding of fact is controlling unless found to be clearly erroneous. Lundgren v. Freeman, 307 F.2d 104, 114-115 (9th Cir. 1962); Snider v. England, 374 F.2d 717, 726 (9th Cir. 1967); 55 California Law Review 1053 (1967); 41 Minnesota Law Review 764 (1967); and since the letter itself supports the finding of the trial court, the argument of appellant on waiver of condition precedent by appellee is without merit.

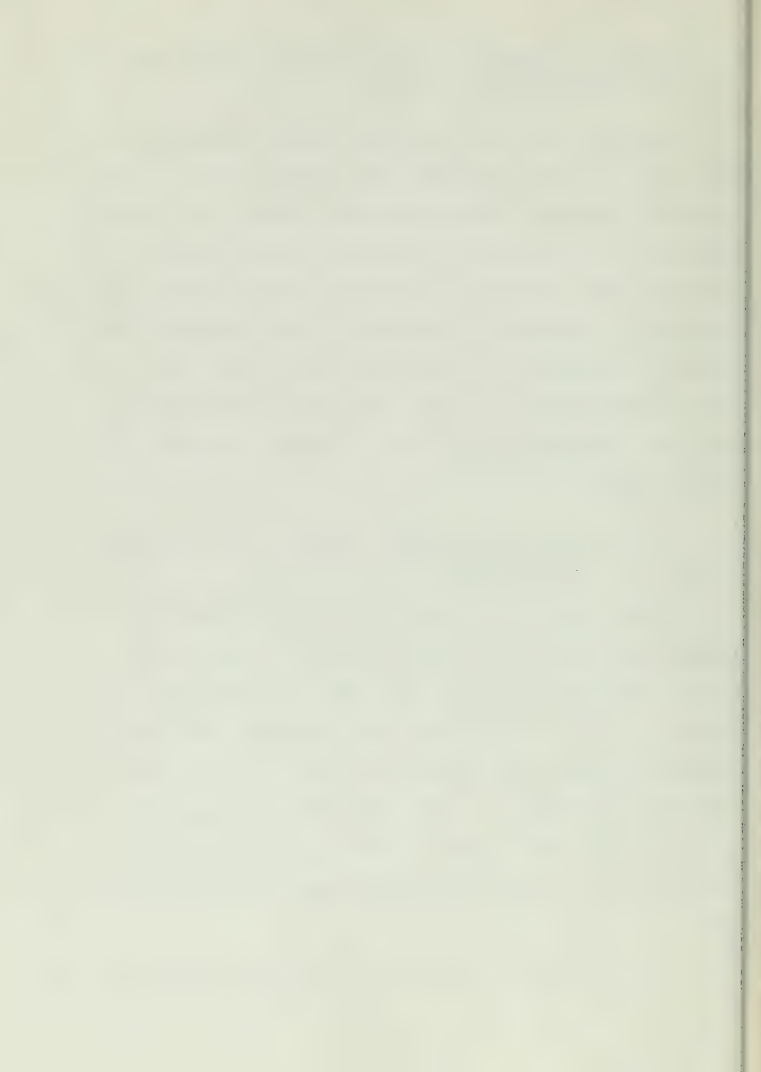
ARGUMENT IN ANSWER TO CONTENTION THERE WAS NO BREACH OF
POLICY PROVISIONS BY APPELLANT.

The cross-motion for summary judgment granted by the
trial court was based upon the legal position that the City
of Seldovia failed to forward the suit papers for a period of
seventy-five (75) days after they had been served upon them,
and further that the City of Seldovia breached its duty of
cooperation in defense of the cause of action without per-
mitting the plaintiff its right to defend. Each topic will
be discussed separately to show they provide alternative
reasons why plaintiff is entitled to summary judgment as a
matter of law.

A. Failure to Notify Plaintiff That Suit Had
Been Commenced.

In the case at bar, the suit against the City of
Seldovia was filed in the Superior Court for the Third
Judicial District on December 13, 1965 and was served on
December 28, 1965 (R 185). However, no notice was forwarded
to plaintiff herein until March 16, 1966. (R 201). The City
of Seldovia filed answer to the complaint on January 17, 1966
(R 185, 224) and participated in the following discovery
procedures before notifying appellee that the suit had been
filed:

1. Attended the deposition of Abe Thomas taken
by attorneys for McEwen on January 31, 1966 (R 142).



2. Attended the deposition of Richard Wolf taken by attorneys for McEwen on March 3, 1966 (R 142).

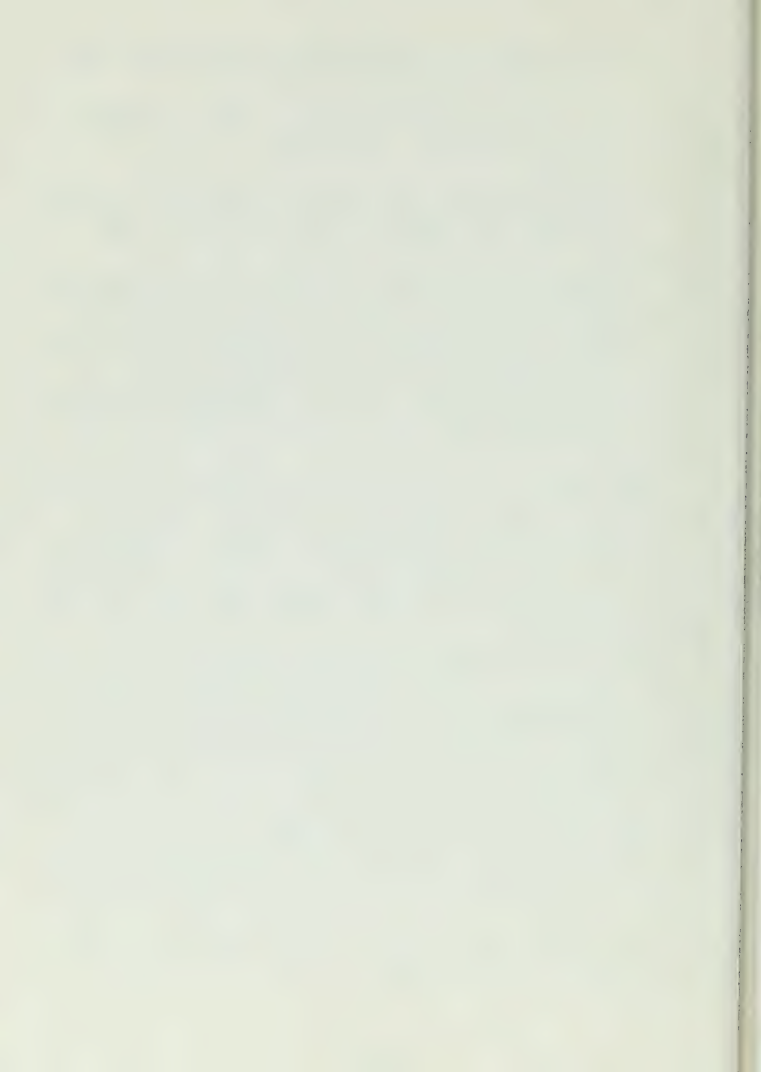
3. Attended the deposition of Jack R. Simpson taken by attorneys for McEwen on March 7, 1966 (R 142).

4. Attended the deposition of Doris Fleck, medical records librarian at Providence Hospital, taken by attorneys for McEwen on March 7, 1966 (R 185).

5. Did not contest in any way a motion for inspection and copying 'all written statements of witnesses to the occurrence which is the subject matter of the complaint including any and all written statements of the defendants or the plaintiff which may be in the possession of the defendants . . . including photographs and diagrams of the scene' filed on February 25, 1966 and granted by the Superior Court on March 10, 1966 (R 209-211).

Additionally, on March 31, after sending letter of March 6 to appellee concerning the suit in question, appellant stipulated with attorneys for plaintiff, McEwen, to take the deposition of Charles McEwen at Salt Lake City, Utah on April 1, 1966 (R 187, 225).

Notice of the taking of depositions, together with subpoenas for appearances had been served on witnesses Bryant, Brewster, Knight, Charlotte, Eaulsos and Reardon for March 9 and 10 at Seldovia, Alaska but such depositions were not taken because bad weather prevented the attorneys from getting to Seldovia, Alaska (R 226). However, the investigator working on behalf of McEwen did discuss the case with the witnesses Bryant, Brewster and Reardon at the time of service of said papers on March 1, 1966 (R 226).



The policy in question herein specifically provides that the insured will immediately forward any suit papers which are served upon him to the company herein. (R 31, 60, 83, 119).

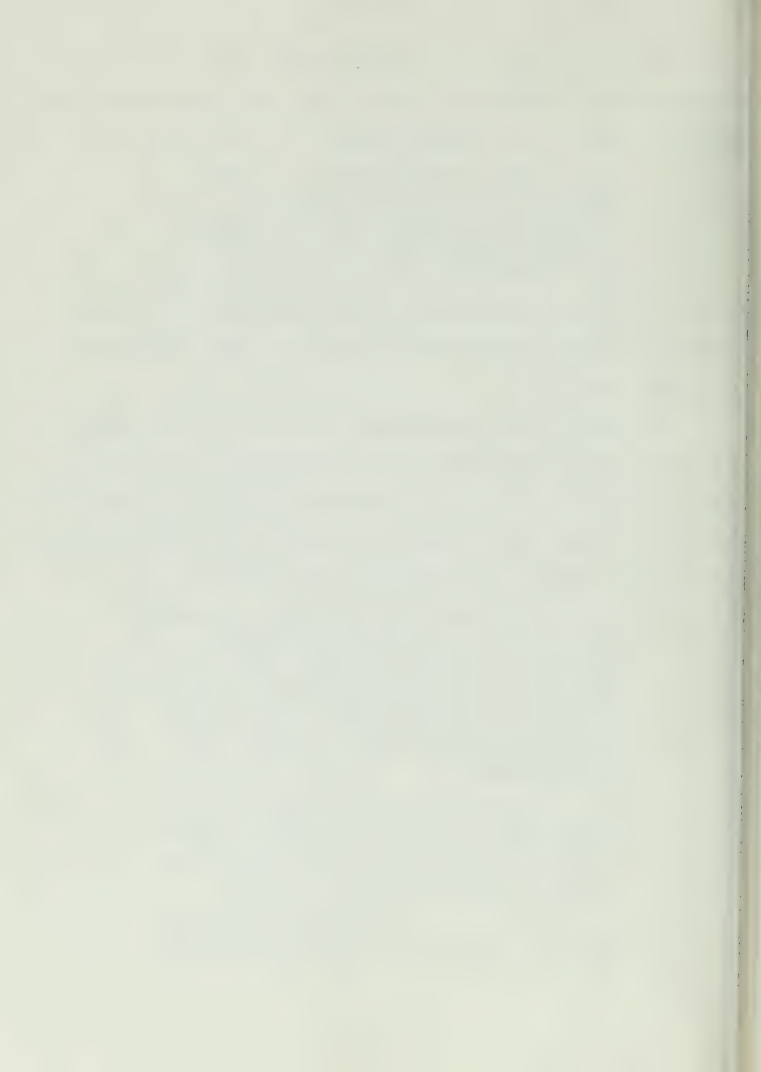
"If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative." (Condition No. 10)

Section 12 further provides that such action by the insured could be a condition precedent to recover under the policy. (R 31, 60, 83, 119).

The general rule concerning the failure of the insured to forward the suit papers within a reasonable time is set forth in 18 A.L.R.2d 443 in the Annotation entitled "Liability Insurance: clause with respect to notice of accident or claim, etc., or with respect to forwarding suit papers":

"(1) It is well settled that a provision in a liability policy requiring the giving of notice of accident and claim and the forwarding of suit papers to the insurer is a reasonable and valid stipulation, its purpose being to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances.

(2) Regarding the nature and effect of the clause, a distinction has been made between policies which expressly make compliance with the clause a condition precedent to the liability of the insurer under the policy, and those which admit such an expressed statement. Wherever the liability policy makes the insured's failure to give timely notice



expressly the grounds of forfeiture, or compliance therewith a condition precedent to the insurer's liability, no recovery can be had where timely notice has not been given. . ." (p. 447)

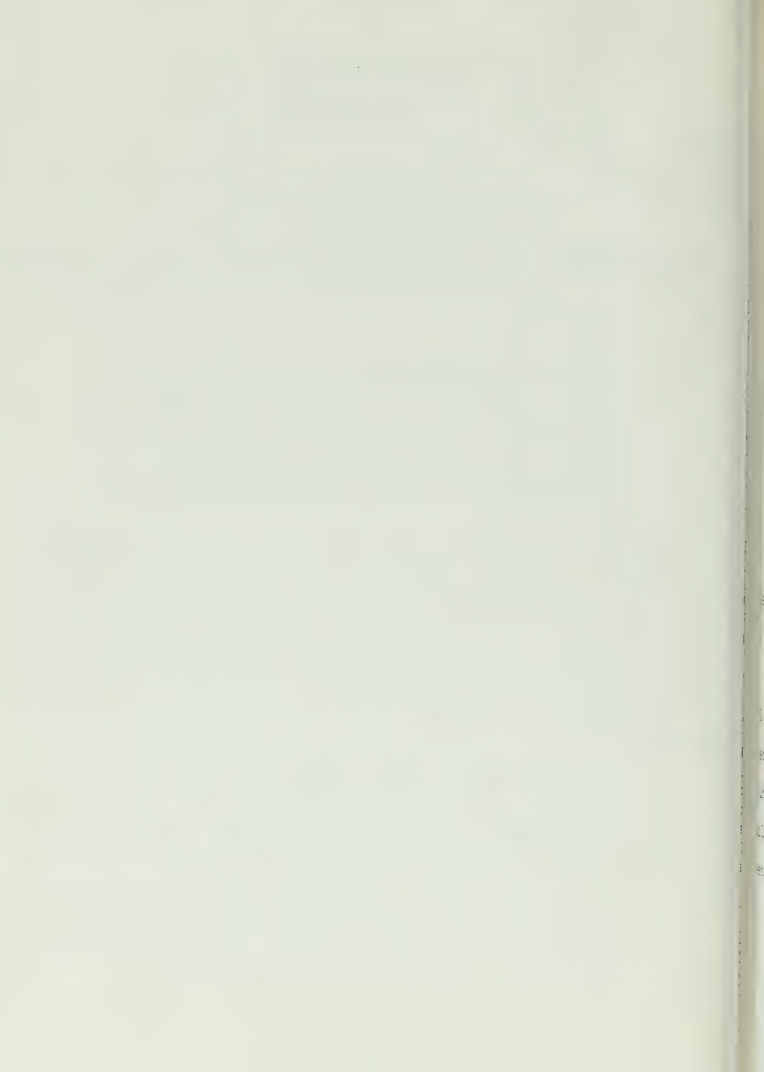
A similar view has been recently followed by the United States District Court for the District of Alaska in the case General Accident Fire and Life Assurance Corp. Ltd. v. Prosser, 39 F.Supp. 735 (D.C. Alaska 1965) where the following statement is made on page 739:

"There is no ambiguity in the terms of the policy involved in this case. Where, as herein, the policy in express terms makes the giving of notice a condition precedent, the insurer is not required to show prejudice and the failure to comply with the terms and conditions of the policy will bar recovery." (Citations omitted).

It should be noted at this time that in another recent opinion Ness v. National Indemnity Co., 247 F.Supp. 944, 948 (D.C. Alaska 1965), the United States District Court for the District of Alaska again pointed out the rules which should be considered in determining whether or not the policy of insurance is ambiguous:

"Courts have no power to make or rewrite contracts of insurance, and where the terms of the contract are clear and unambiguous, it is the duty of the court to enforce the contract as written. (Citation omitted).

In Stock and Grove, Inc. v. City of Juneau, Alaska, 403 P.2d 171, Opinion No. 292, June 21, 1965, the Supreme Court of Alaska stated as a general rule of law that the clear



and unambiguous terms of a contract may be interpreted by the general and accepted usage of the trade of business involved.

In Pepsi Cola Bottling Co. of Anchorage, Inc. v. New Hampshire Ins. Co., et al, Alaska, 407 P.2d 1009, Opinion No. 308, November 26, 1965, the same court stated that it was in agreement with those authorities which hold where the terms of the policy of insurance are clear and unambiguous, the intent of the parties must be ascertained from the instrument itself.

This court is satisfied that if the Supreme Court of Alaska were called upon to decide the question as raised in this case, it would do so in accordance with the basic and well-established principles of law stated herein, its pronouncements in Stock and Grove and Pepsi Cola, and in accordance with sound reasoning and common sense. . ."

See also, 8 Appleman, Insurance Law and Practice, Section 47.40
on page 59.

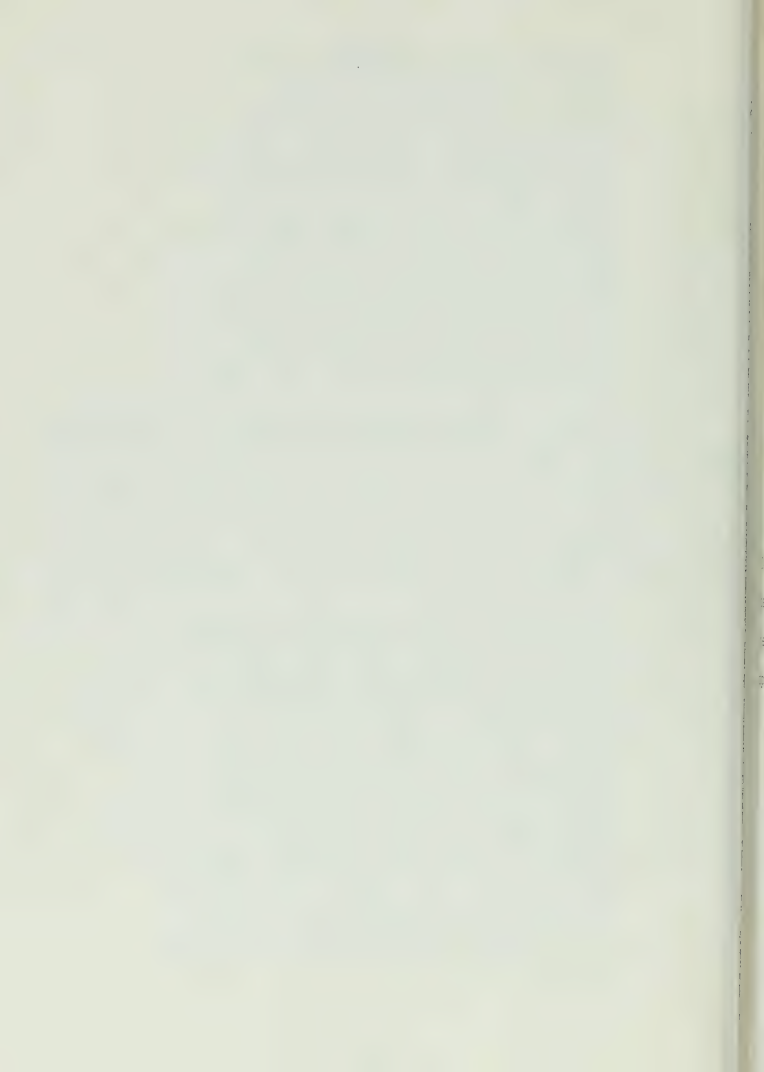
In the case of Aufderhar v. American Employer's Ins. Co.,
381 F.2d 681 (8th Cir. 1964), the trial court ruling holding
there was no duty to defend was upheld by the Eighth Circuit
Court of Appeals where it appeared that the omnibus insured
failed to notify the company even though he knew a suit had
been commenced against him.

"Thus, in the instant case, the insured,
with knowledge of his coverage from
participation in settlement of a prior
claim and notice of action's pendency

breached a valid provision of the policy by neglecting to inform the insurer of the pendency of the action. Moreover, it is readily discernible from the Arkansas Supreme Court's rationale in Warren, supra, that substantial compliance with the notice provisions of the insurance policy with respect to an insured's duty to inform the insurer when served with process would control in like manner when the insured had only knowledge of the lawsuit, since the provision's purpose of availing the insurer the opportunity to prepare its course of action without prejudice of delay would be equally served in both instances." (p. 685).

In the case of Aetna Casualty & Surety Co. of Hartford, Conn. v. Martin, 377 S.W.2d 583, 585 (Ky. 1964), the Kentucky Court of Appeals held that prejudice to the insurance carrier could be presumed where the insured waited 60 days before informing the company that a suit had been commenced:

"There is, however, no question that as a matter of law there was a breach of the condition in the policy by Mullins in waiting more than sixty days before forwarding the process to the appellant. The term "immediately forward" means within a reasonable time. (Citation omitted). Mullins' failure was due simply to his lack of interest in promptly informing himself of the nature of the claim against him and his unwarranted assumption that the appellant would protect him and itself without action on his part. The inquiry into whether or not there was prejudice to the appellant occasioned by this unreasonable delay is not germane; prejudice to the insurer is presumed." (Citation omitted).



In the case of DeVigil v. General Accident Fire & Life Insurance Co., 146 F.Supp. 729 (D.C. Hawaii 1956), the United States District Court for Hawaii granted summary judgment for failure of insured to forward the suit papers even though the company obtained notice of the suit from another source.

"The record in this case fails to support plaintiff's claim that performance of the 'forwarding of all suit papers' condition was waived. Although the defendant insurance company had written notice of a potential claim against Meyers and was aware of the fact that plaintiff had filed an action against him, the company was not required to defend its assured because of his failure to comply with condition 7 of the policy." (p. 731).

In the case of National Surety Corp. v. Wells, 287 F.2d 102 (5th Cir. 1961), the Fifth Circuit Court of Appeals noted that Texas decisions followed the rule presuming prejudice from the failure to forward suit papers unless some reasonable reason appeared for the failure to do so:

"In assaying the correctness of the District Court's disposition, we start with the acceptance of the Insurer's assertion that with respect to forwarding legal process, just as in the situation concerning notice of the occurrence, Texas regards as immaterial a showing of prejudice. (Citations omitted). If the condition of the policy is not satisfied, the contract is treated as breached and the Assured fails, not because what he did not do injured the insurer, but rather because the assured did not perform his contractual obligations." (p. 105).

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See Lamont v. State Farm Mutual Automobile Ins. Co.,
51 N.E.2d 701, 704 (Ind. 1958); State Farm Mutual Automobile
Ins. Co. v. Cassinelli, 216 P.2d 606, 616 (Nev. 1950);
Interton v. VanZandt, 351 S.W.2d 696, 702 (Mo. 1961).

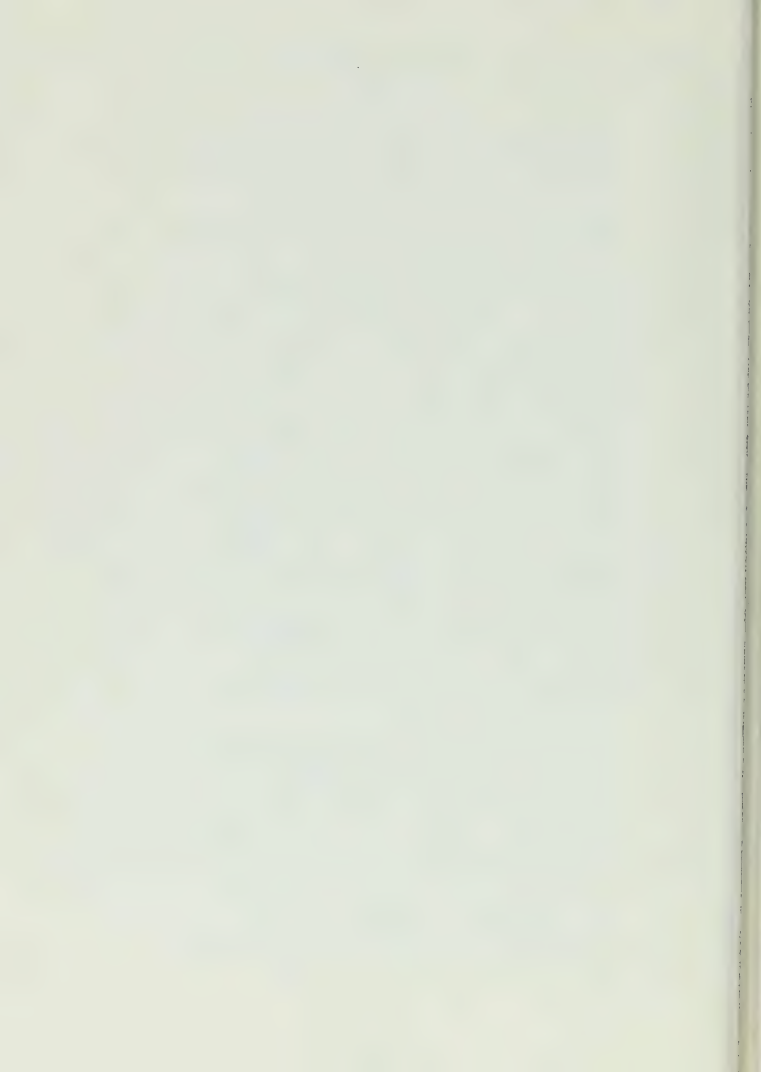
Thus, in the case at bar, the failure of the City of
Seldovia to forward the suit papers for 75 days was a vio-
lation of a condition precedent under the policy especially
in a case where the defendant's own counsel was taking an
active part in preparation of the lawsuit.

B. Failure to Cooperate by Defending Suit.

As an alternative and totally independent ground for
granting summary judgment herein, it is urged as a matter of
law the actions of the defendant, City of Seldovia set forth
herein constitutes a breach of the cooperation clause which
provides as follows: (R 31, 60, 83, 119).

"The insured shall cooperate with the
company and upon the company's request
shall attend hearings and trials and
shall assist in effecting settlements,
securing and giving evidence, obtaining
the attendance of witnesses and in the
conduct of suits. . ." (condition 11).

The City of Seldovia did not cooperate in the defense
of the suit; they simply defended the suit without notifying
their insurance carrier. The right of the insurer so far as
the defense of a cause of action under the insurance is



Risjord and Austin, in an article entitled "Obligation of Insurer to Defend After Exhaustion of Policy Limits" in 6 Federation of Insurance Counsel Quarterly, 18 on page 822 also states:

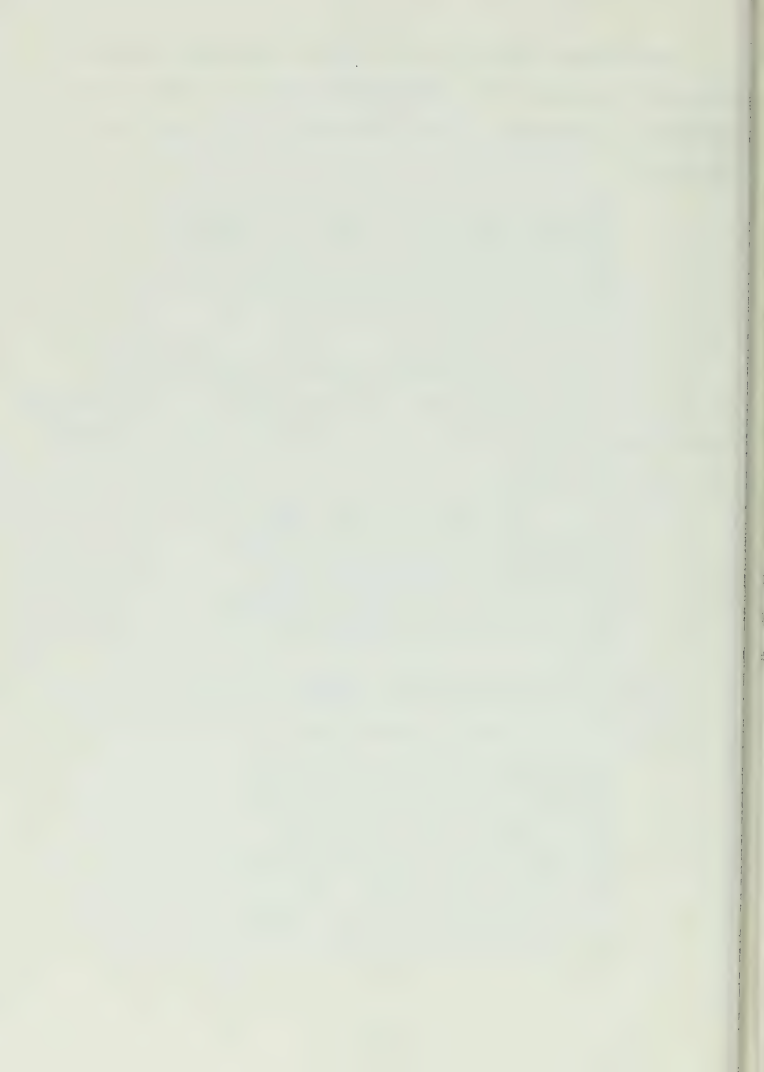
"As a necessary corollary to insurance against liability in place of indemnity against loss, the insurance policies, for the protection of the insurer, provide that the insurer should have both the duty and the exclusive right to defend the insured."

In the case of Auerbach v. Maryland Casualty Co., 140 N.E. 577, 579 (N.Y. 1923), the exclusive nature of the insurance contract permitting the insurer to defend the cause of action is set forth as follows:

" . . . The Plaintiffs when they accepted the policy, did so with full knowledge of the fact, if any action were brought, that they surrender to the insurance company absolute, full and complete control of it, including settlement or trial. . . ."

Similarly in Countryman v. Breen, 271 N.Y.S. 744, 747 N.E. 536 (1932) a similar statement was made:

"The insurance contract between Defendant and the company is an indemnity contract. The reason why absolute authority is given the insurer in the matter of settlements with claimants against the insured is obvious. And the authority of the insurer as to this is absolute. . . The insured cannot compel the insurer to settle nor prevent it from doing so. . ."

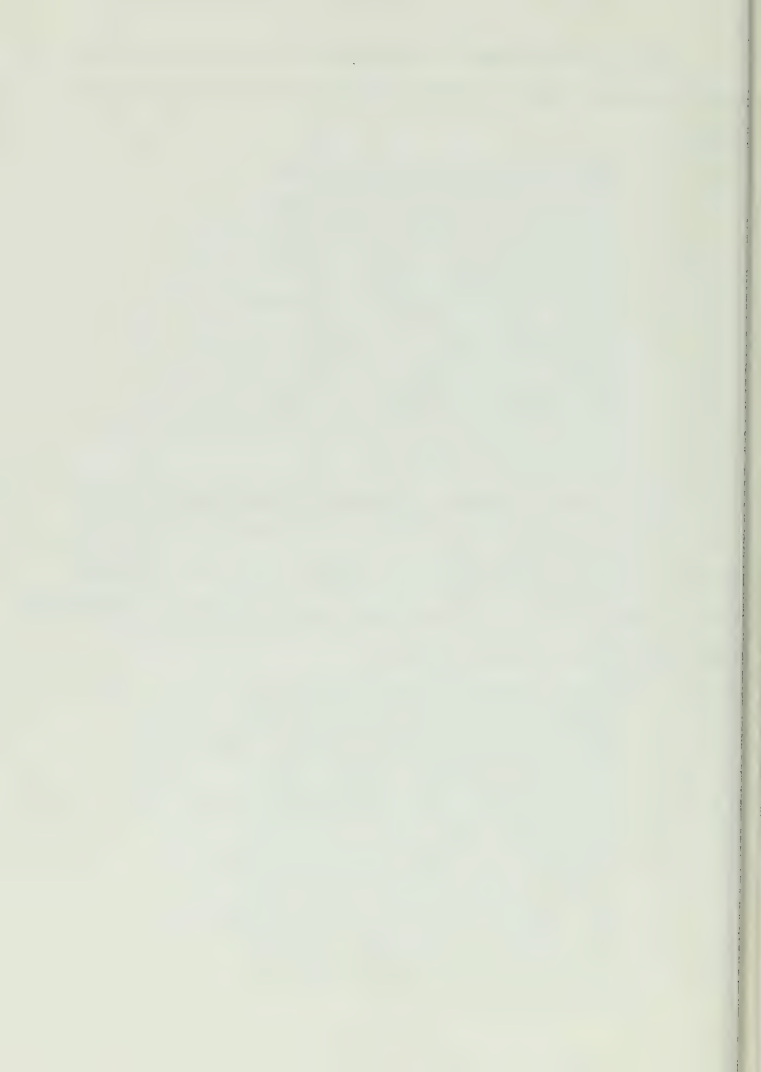


In an article found in 26 Insurance Counsel Journal, page 585, this right of control is explained in the following terms:

"The right and control of the insurer over the defense of litigation brought against the insured within the preview of the policy is so absolute and unquestioned that in the absence of bad faith the insurer is immune from liability on account of its failure to accept the settlement offer in an amount within the policy limit where eventually a judgment is secured, the insured following its unsuccessful defense of the insured at the trial, (the decisions so holding are legion)."

In the case of Dodge v. Fireman's Fund Ins. Co., 362 W.2d 767, 769 (Mo. Ct. App. 1962), the Missouri Court of appeals recognized this point in holding that the exclusive right of control of the litigation under the insurance contract rests with the insurance company:

"Since Fireman's Fund Insurance Company alone must pay any of the judgments obtained, it should have the exclusive right to control and conduct the whole defense rather than to share that responsibility with another insurance company whose excess coverage under the facts presented will not be called upon. It would be unjust to Fireman's Fund Insurance Company to declare that it has a duty to defend and the obligation to pay the judgment, if obtained, and still to permit Federal Mutual Insurance Company to participate in the control of the defense."

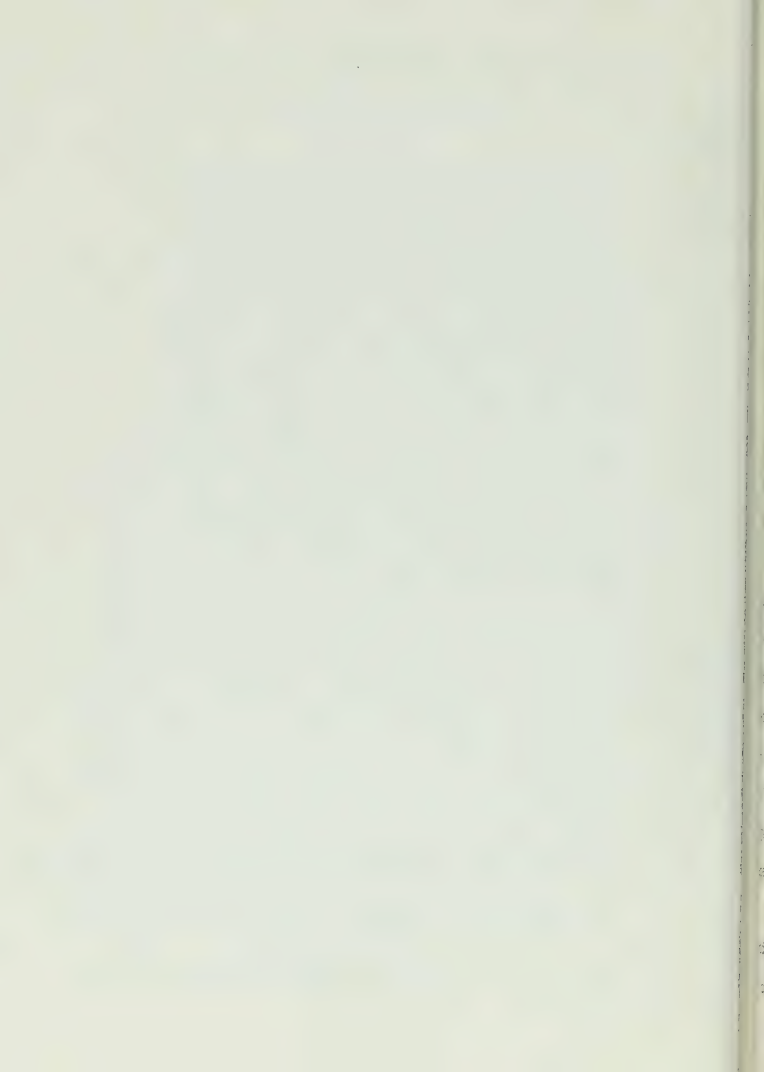


A similar view was expressed by the Supreme Court of Iowa in the case of Railsback v. Buesch, 114 N.W.2d 916, 918 (Iowa 1962):

"In cases of this type against insurance, the appointment of employee of plaintiff's attorney as administrator of the defendant's estate has not been considered improper, since the object of such appointment was to secure a representative of such estate against whom the creditor's claims might be asserted. (Citation omitted). It follows that the insurance company should have the right to control and conduct the defense and the administrator should not interfere with the legal exercise of that right. It appears counsel for claimant realized this because they filed written consent (subsequently orally enlarged) that the original order granting equitable relief be set aside and the matter stand for trial upon claimant's original application for equitable relief filed November 28, and as though no evidence had been introduced. . ."

In the case at bar the complaint had been filed on December 13, 1965 (R 185) and had been served on the City of Seldovia on December 28, 1965 (R 185). The City of Seldovia filed an answer to the complaint on January 17, 1966 (R 185, 224) and participated in the following discovery procedures before notifying appellee that the suit had been filed:

1. Attended the deposition of Abe Thomas taken by attorneys for McEwen on January 31, 1966 (R 142).
2. Attended the deposition of Richard Wolf taken by attorneys for McEwen on March 3, 1966 (R 142).
3. Attended the deposition of Jack R. Simpson taken by attorneys for McEwen on March 7, 1966 (R 142).



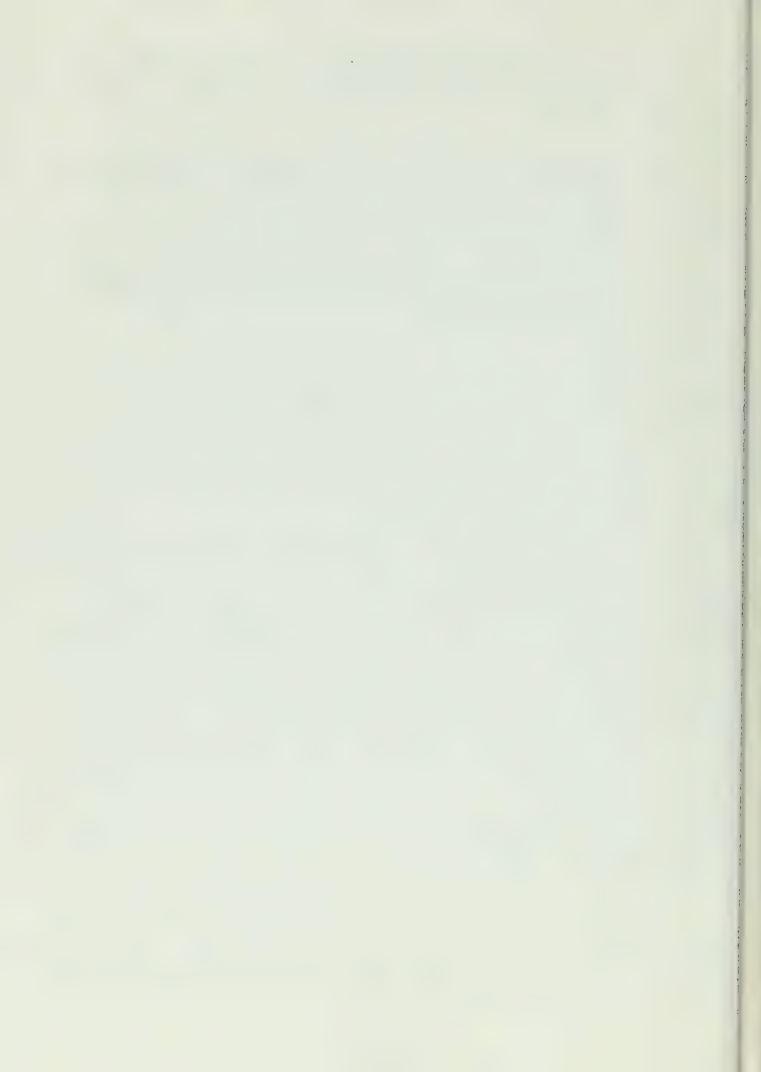
4. Attended the deposition of Doris Fleck, medical records librarian at Providence Hospital, taken by attorneys for McEwen on March 7, 1966 (R 185).

5. Did not contest in any way a motion for inspection and copying 'all written statements of witnesses to the occurrence which is the subject matter of the complaint including any and all written statements of the defendants or the plaintiff which may be in the possession of the defendants. . . including photographs and diagrams of the scene' filed on February 25, 1966 and granted by the Superior Court on March 10, 1966. (R 209-211).

Additionally on March 31, after sending the letter of March 16 to appellees concerning the suit in question, appellant stipulated with attorneys for plaintiff, McEwen, to take the deposition of Charles McEwen at Salt Lake City, Utah on April 9, 1966 (R 187, 225).

Notice of the taking of depositions, together with subpoenas for appearances were served on witnesses Bryant, Brewster, Knight, Charlotte, Eaulsos and Reardon for March 9 and 10 at Seldovia, Alaska but such depositions were not taken because bad weather prevented the attorneys from getting to Seldovia, Alaska (R 226). However, the investigator working on behalf of McEwen did discuss the case with the witnesses Bryant, Brewster and Reardon at the time of service of said papers on March 1, 1966 (R 226).

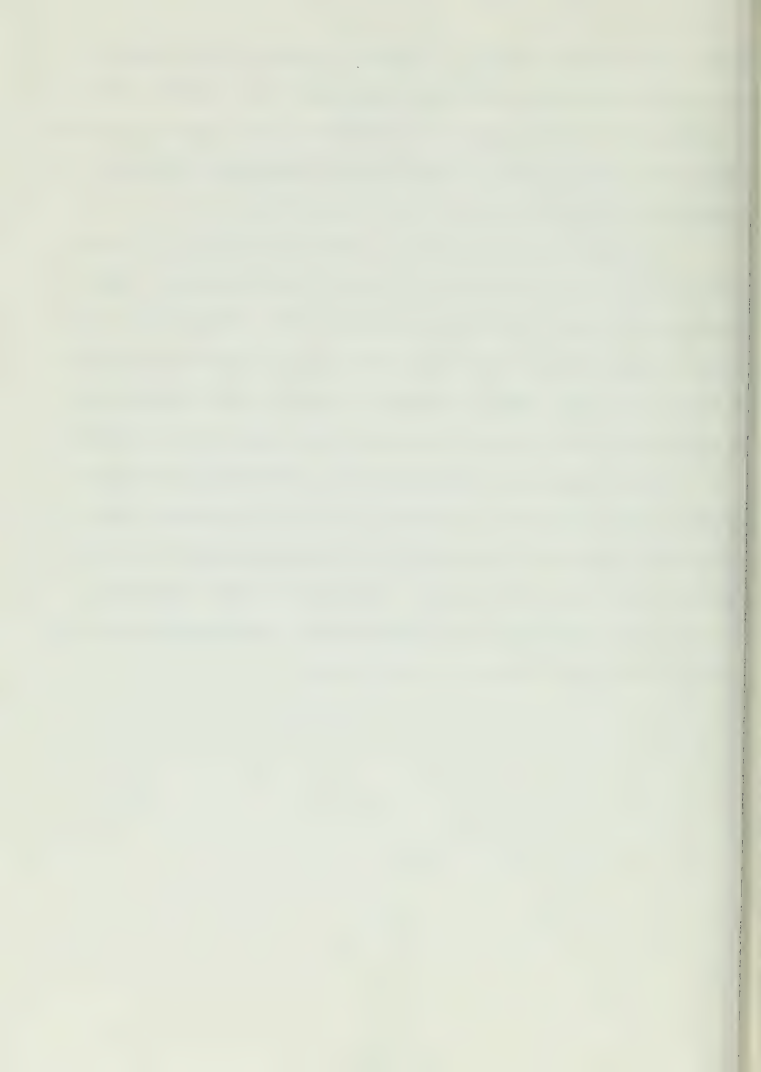
The complete character of the lawsuit was set by the conduct of the attorneys for the City of Seldovia. The theory of defense and the depositions taken were undoubtedly taken to



support the theory chosen. Rightly or wrongly the unasked and unanswered questions concerning any other theory would be foreclosed because now the witnesses whose depositions had been taken would always be subject to impeachment for not answering such questions at their depositions.

No two lawyers approach a lawsuit the same way, and certainly no two lawyers try a lawsuit the same way. The company has chosen its counsel because of a recognition of a method of preparation and trial with which they are familiar so they should not have to abandon such for the uncertainty of preparation and trial over which they exercise no control.

Again preparation and trial by attorneys and claims managers familiar with all phases of tort litigation must be considered generally superior to the same approach by those less specialized. The control exercised by the attorneys for the City of Seldovia was unfortunate but nevertheless was a choice which was fatal to their claim.



III. ARGUMENT IN ANSWER TO CONTENTION OF THE CITY OF SELDOVIA THAT APPELLEE HAS THE BURDEN OF PROVING PREJUDICE FOR FAILURE TO FILE SUIT PAPERS.

In the memorandum of decision filed by the United States District Court for the District of Alaska (See Record 237-239) the court held that on the basis of the reasoning and authorities contained in plaintiff's memo in opposition to defendant's motion for summary judgment, the appellee was entitled to summary judgment as a matter of law. (Entire decision set forth in the Statement of Case.)

In such memorandum on pages 6, 7, 8 and 9 (Record 163-166) it was argued that any delay under condition number 10 of the policy would be a violation of a condition precedent to recover under the policy and no prejudice need be shown by the insurer in order to establish the lack of right of recovery on the part of the appellant herein.

The finding of the United States District Court was to the effect that under Alaska Law, no prejudice need be shown in order to show a failure to comply with the terms and conditions of the policy and thus bar recovery herein. This finding of the United States District Court as to the law of Alaska where there are no Supreme Court of Alaska cases should be accepted on review by the Ninth Circuit Court of Appeals unless shown to be clearly wrong. See Bonet v. Texas Company, Inc., 308 U.S. 463, 84 L.Ed. 401, 405 (1940).

The Ninth Circuit Court of Appeals has followed this view as recently as the opinion of Owens v. White, 380 F.2d 10, 315 (9th Cir. 1967) where the court stated as follows:

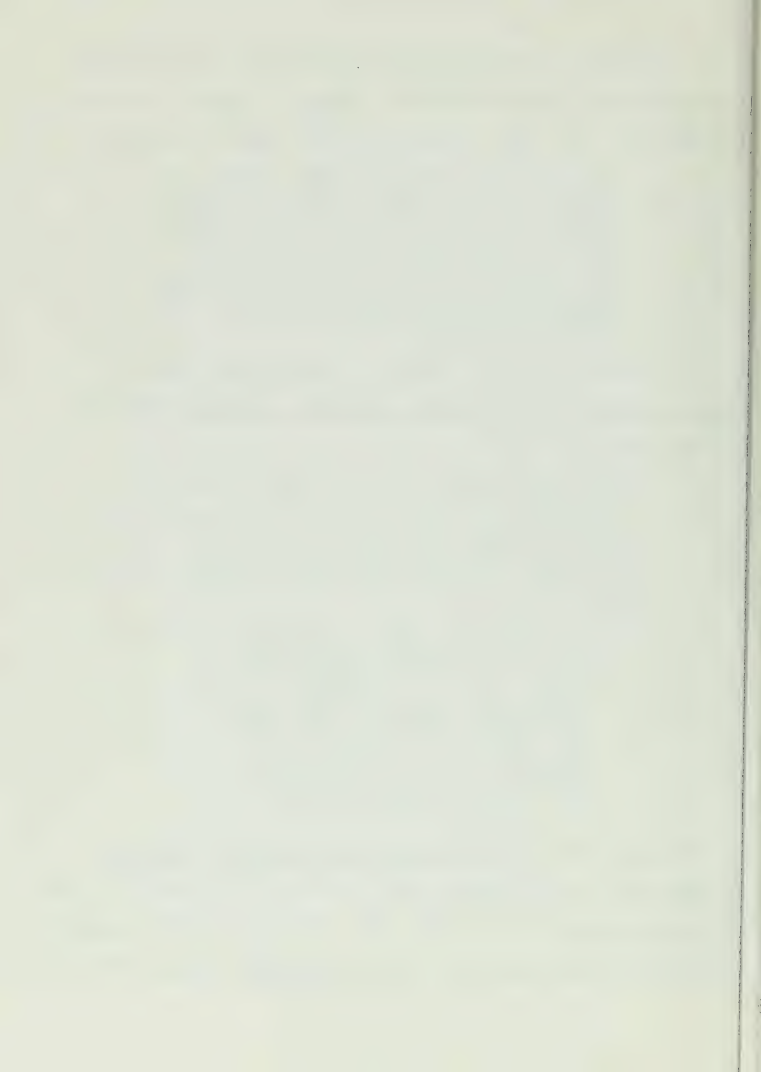
"Analysis by a District Judge of the law of the state in which he sits, his determination of the result which the highest court of that state would probably reach under the same facts, is entitled to great weight. (Citation omitted). That determination 'will be accepted on review unless shown to be clearly wrong.'" (Citations omitted).

An almost identical quote is found in the case of Minnesota Mutual Life Insurance Company v. Lawson, 377 F.2d 25, 526 (9th Cir. 1967):

"The parties agree that we are to look to the law of the State of Minnesota. (Citations omitted). The United States District Court for the District of Minnesota construed the same policy as the trial court in this case construed it:

The district court's considered view as to the law of the state in which it sits is entitled unless shown to be clearly wrong. (Citations omitted). Appellant has failed to demonstrate that the view of the Minnesota law stated by the District Court of the District of Minnesota was 'clearly wrong.'"

See also the cases of Globe Indemnity Company v. Capital Insurance and Surety Company, 352 F.2d 236, 238 (9th Cir. 1965); Cott v. Stocker, 380 F.2d 123, 126 (10th Cir. 1967); Capital Insurance & Surety Company v. Globe Indemnity Company, 382 F.2d

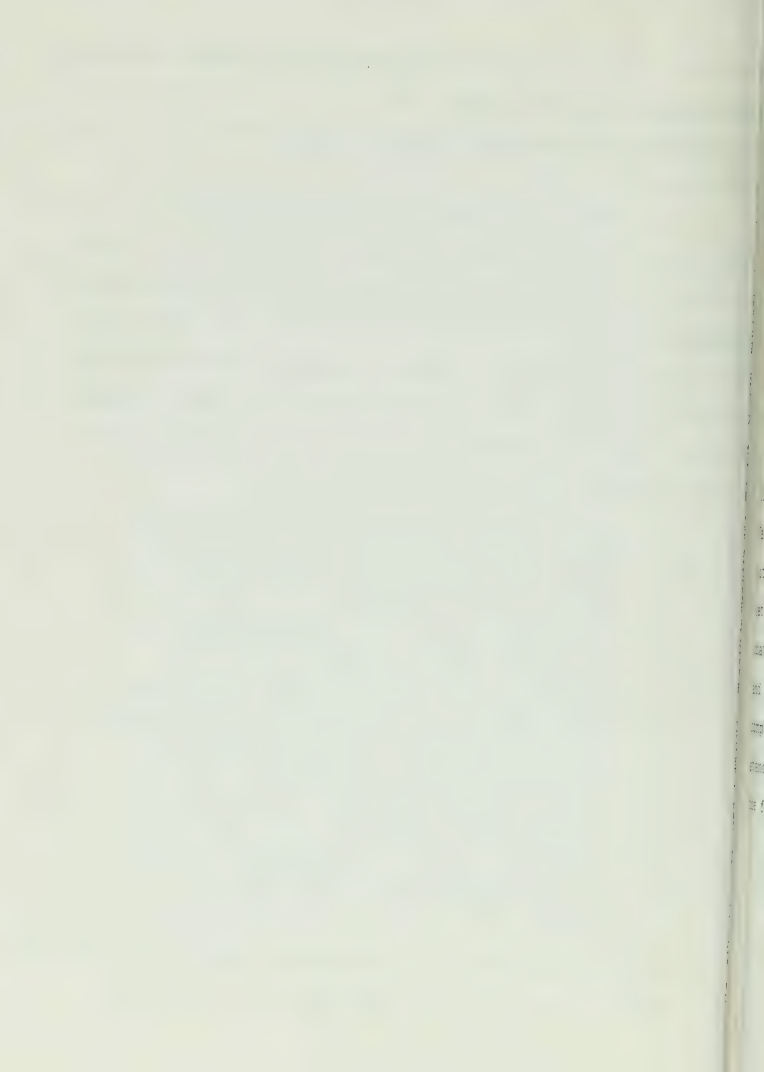


23, 626 (9th Cir. 1967); Employers Mutual Casualty Company v. FA Mutual Insurance Company, 384 F.2d 111 (10th Cir. 1967); Great-West Life Assurance Company v. Levy, 382 F.2d 357, 359-60 (10th Cir. 1967).

As stated by the Bonet (84 L.Ed. 401, 405-406) case by the United States Supreme Court and reiterated by the Ninth Circuit in the Globe Indemnity Company v. Capital Insurance Company case found in 352 F.2d 236 at 238, it is not enough that the Circuit Court of Appeals disagree with the interpretation, the error must be clear or manifest before it should reverse the interpretation as to local law as found by the United States District Court Judge:

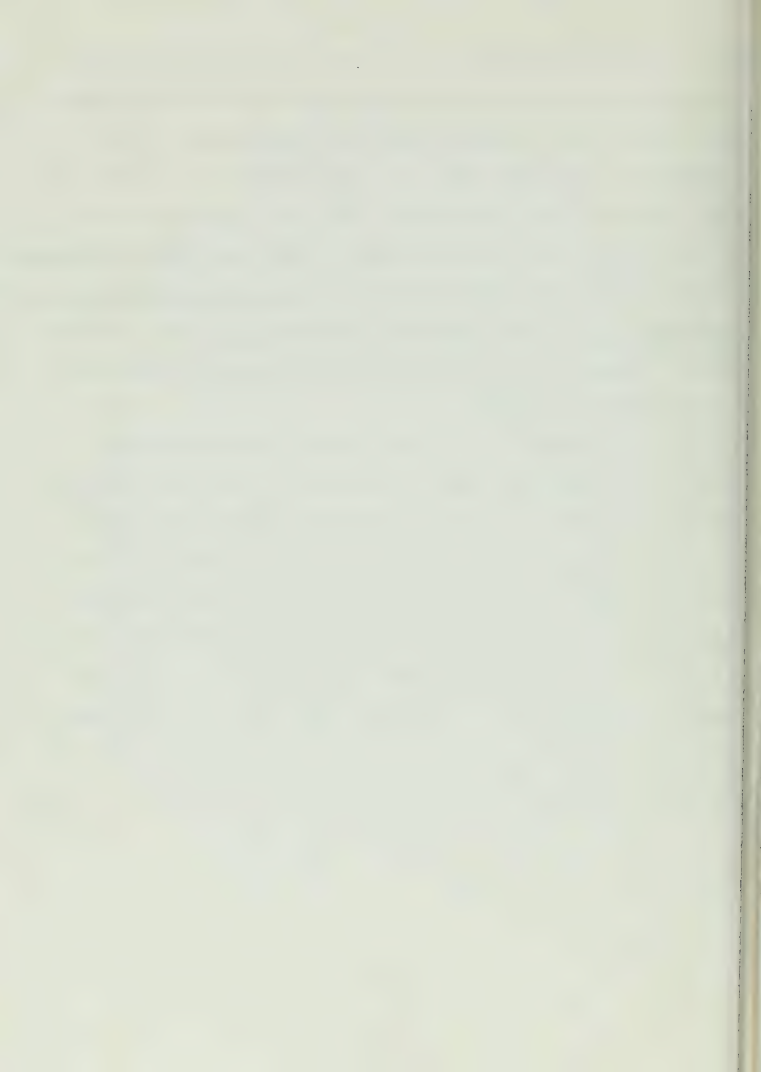
"We now repeat once more that admonition. Merely adding lip service to that rule is not enough. To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with the interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations, that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

It is clear, under the annotation found in 18 A.L.R.2d 43, notes 24 and 25 and the supplements to American Law



Reports published in 1965, that there is a split of opinion concerning the need for a showing of prejudice in this particular area. While there is area for disagreement it is suggested to the court that the interpretation of the District Court Judge is quite reasonable under the circumstances and in line with the decisions of Hart v. National Indemnity Company, 422 P.2d 1015, 1022 (Alaska 1967) and Pepsi Cola Bottling Co. of Anchorage, Inc. v. New Hampshire Insurance Co., 433 P.2d 670, 674-675 (Alaska 1967) which restrict the sweep of insurance interpretation in Alaska.

The findings of the trial judge that complaint was filed in the Superior Court on December 13, 1965 and that on January 17, 1966 the city had filed its answer, but that no notice of the suit was given until March 16, 1966 was a violation of condition number 10 of the policy which required that notice of the suit be immediately forwarded to the company and thus, under section 12 there was no action against the company on the policy in question. This interpretation must stand because it is not clearly erroneous and is in line with the facts as stipulated to.



IV. THE ACTS ALLEGED IN THE COMPLAINT OF CHARLES McEWEN ARE NOT WITHIN THE COVERAGE OF THE POLICY SO APPELLEE HAD NO DUTY TO DEFEND SUCH SUIT.

Even if the Court follows the position urged by the appellant the appellant is not entitled to recover against appellee for there has been no breach of contract because the complaint by Charles McEwen against appellant does not allege claims which are within the coverage of appellee's policy of insurance.

Before discussing jurisdictions which have ruled on provisions similar to those in the policy herein, it is necessary to examine Alaska Law to determine whether or not this argument may be advanced for the first time on appeal of this cause of action for such an argument was not presented to the trial court.

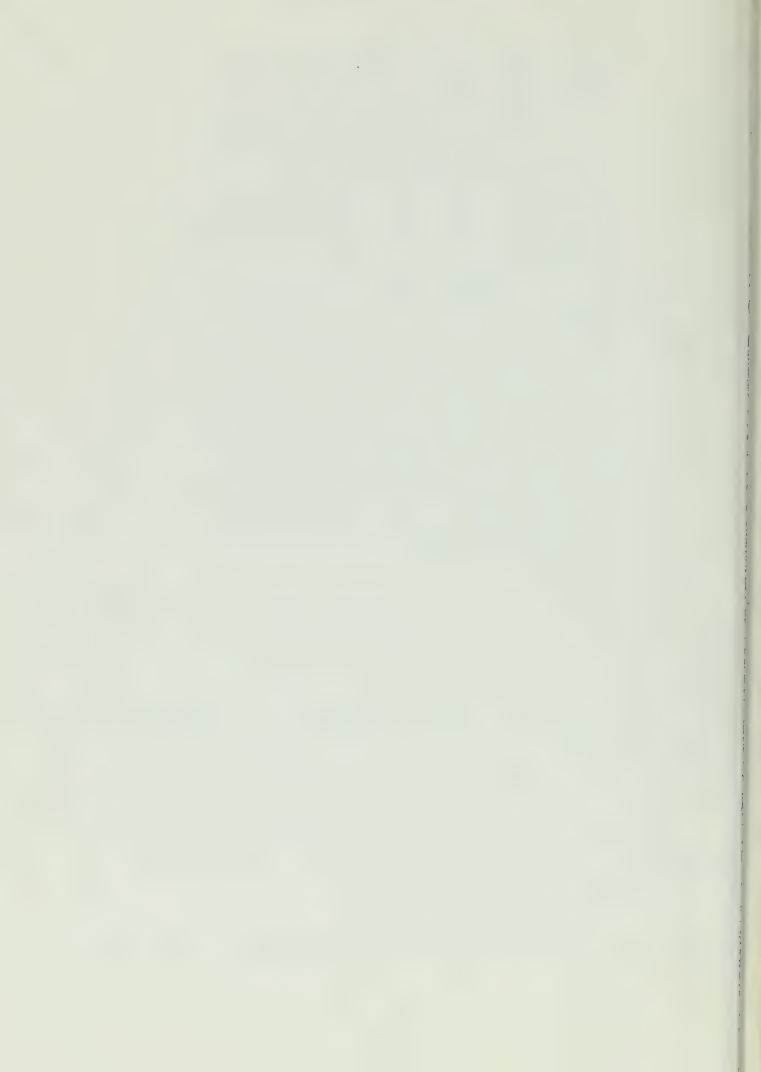
In the case of Ransom v. Haner, 362 P.2d 282, 285 (Alaska 1961), the Supreme Court of Alaska held that it was permissible on appeal to urge for the first time that a decision of the trial court should be upheld for reasons not advanced in the trial court. In disposing of an argument made for the first time on appeal that the appellant's exclusive remedy was under Workmen's Compensation, the Supreme Court of Alaska stated:

"The defendants in their brief urge upon us two other questions that we should consider here, though not raised by them or considered by the

trial court in the hearing on the motion for summary judgment. The first question is whether the plaintiff assumed the risk of any injury in the performance of his work under the circumstances set forth in the complaint and amplified by the affidavits; and the second question is whether the plaintiff's exclusive remedy was under the Alaska Workmen's Compensation Act. In this connection the defendants argue that, if there are any grounds for upholding the summary judgment on their behalf, regardless of whether they are the grounds set forth by the trial judge, the judgment should be affirmed. We agree, for it is a rule of law that an appellee may urge, and the appellant court should consider in defense of a decree or judgment any matter appearing in the record, even if rejected below and even if appellee's argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

Since the case at bar is based upon diversity of citizenship under 28 U.S.C.A. 1332 and the general rule is that the Circuit Court of Appeals should apply the law of the state where the dispute arose [Erie Railroad Co. v. Tompkins, 304 U.S. 4, 82 L.Ed. 1188 (1938)], it is urged that the Ninth Circuit should adopt the Alaska rule in considering this case.

However, in order to avoid embroiling the court in a controversy over whether the rule of law stated by the Alaska Supreme Court is procedural or substantive, it should be noted that the same rule has been applied by the United



States Supreme Court in the case of Jaffle v. Dunham, 352 U.S. 280, 281, 1 L.Ed.2d 314, 315 (1967) where the Supreme Court stated:

"A successful party in the District Court may sustain its judgment on any grounds that finds support in the record. . . ."

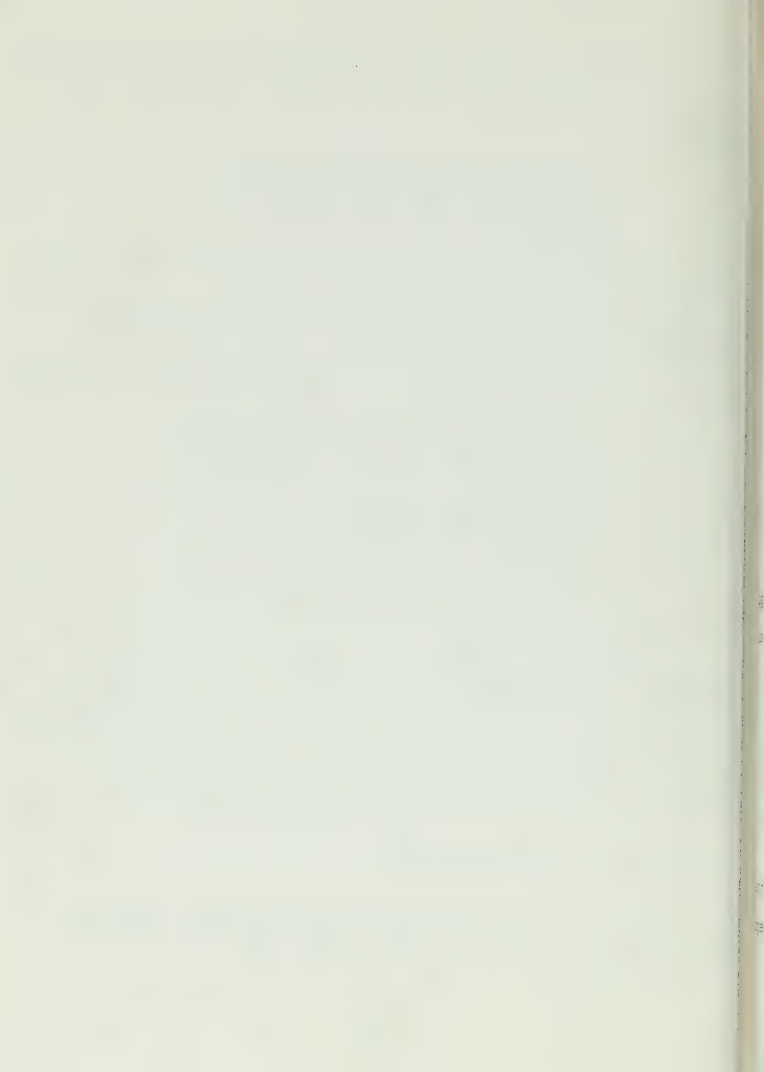
A similar view was expressed by the Ninth Circuit Court of Appeals in Commissioner of Internal Revenue v. Stimson Mill Co., 137 F.2d 286, 287 (9th Cir. 1943) and is further explained in the annotation in 1 L.Ed.2d 1820, 1821 as follows:

"Without taking a cross appeal, the appellee may not attack the judgment below for the purpose of obtaining a modification thereof in his favor, but may urge in support of the judgment below any matter in the record, although his argument may involve an attack upon a ruling of the court below or an insistence upon matters overlooked or ignored by it. . . ."
(p. 1821).

Therefore, a review of case authorities concerning decisions on similar policy provisions is made to establish the validity of the proposition urged herein that said claims are not within the coverage provided by the policy and thus there is no duty to defend this cause of action.

A. Introduction.

In the case of Theodore v. Zurich General Accident & Liability Co., 364 P.2d 51, 55 (Alaska 1961) the Supreme



Court of Alaska held that the duty of the insurance carrier to defend was controlled by the allegation made in the complaint:

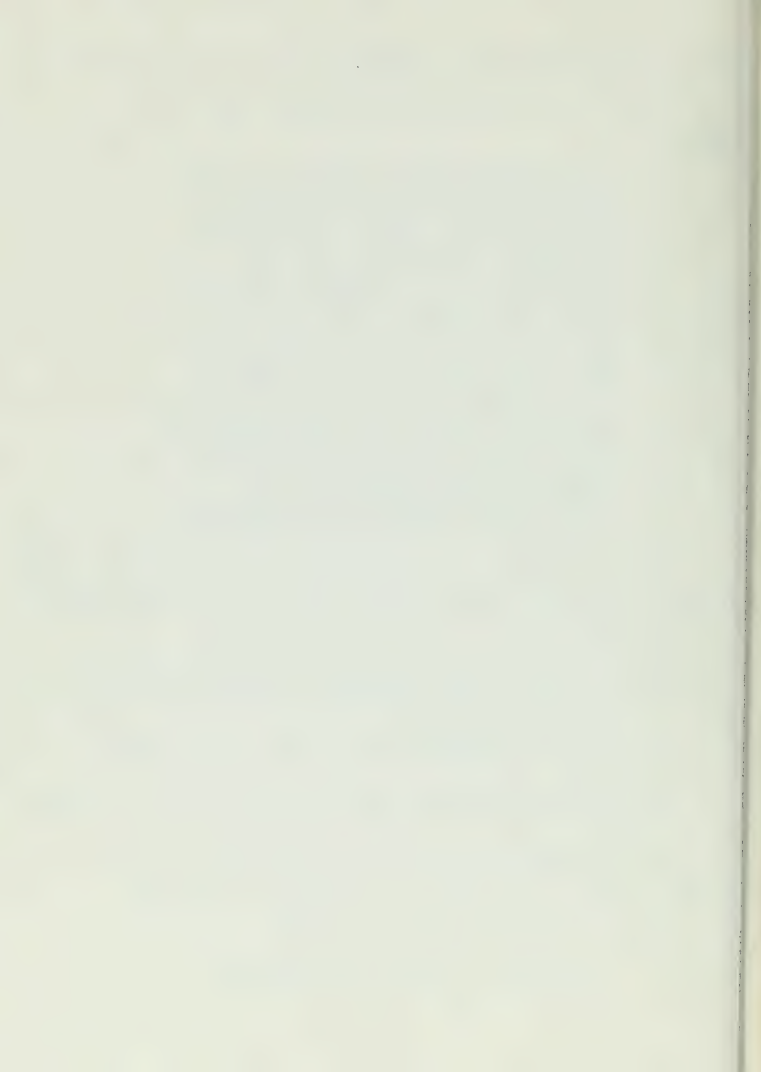
"Zurich promised its insured to defend any suit 'alleging' bodily injury or death under the employer's liability coverage in the policy, even if such suit were 'groundless, false or fraudulent.' This language means that the obligation to defend exists when the injured party asserts a claim which, as a claim, is for loss covered by the policy. It is the allegation made in the complaint that controls. If it comprehends an injury that may be within the policy, then the promise to defend includes it. The promise is not contingent upon the allegation being true. It may not be. But the burden of establishing this - is showing that the suit is 'groundless' is one which Zurich agreed to assume."

The complaint in the case brought by Charles Ramon McEwen against the City of Seldovia (R 171-179) alleged three specific counts as follows:

- Count I - Assault and Battery by using unreasonable and unnecessary force (R 171-175).
- Count II - False Imprisonment from unlawful arrest (R 175-176).
- Count III - Trespass by wilful, malicious and reckless acts (R 176-178).

The insurance policy in force on the day of the accident (R 224, 9-31, 38-60, 66, 79-100, 114, 115-137) specifically provided coverage as follows:

"Coverage B. To pay on behalf of the insured all sums which the insured



shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident." (See R 28, 57, 80, 116).

Under printed section (h) of the Condition Section of the policy (R 30, 59, 82, 118) the following definition is found:

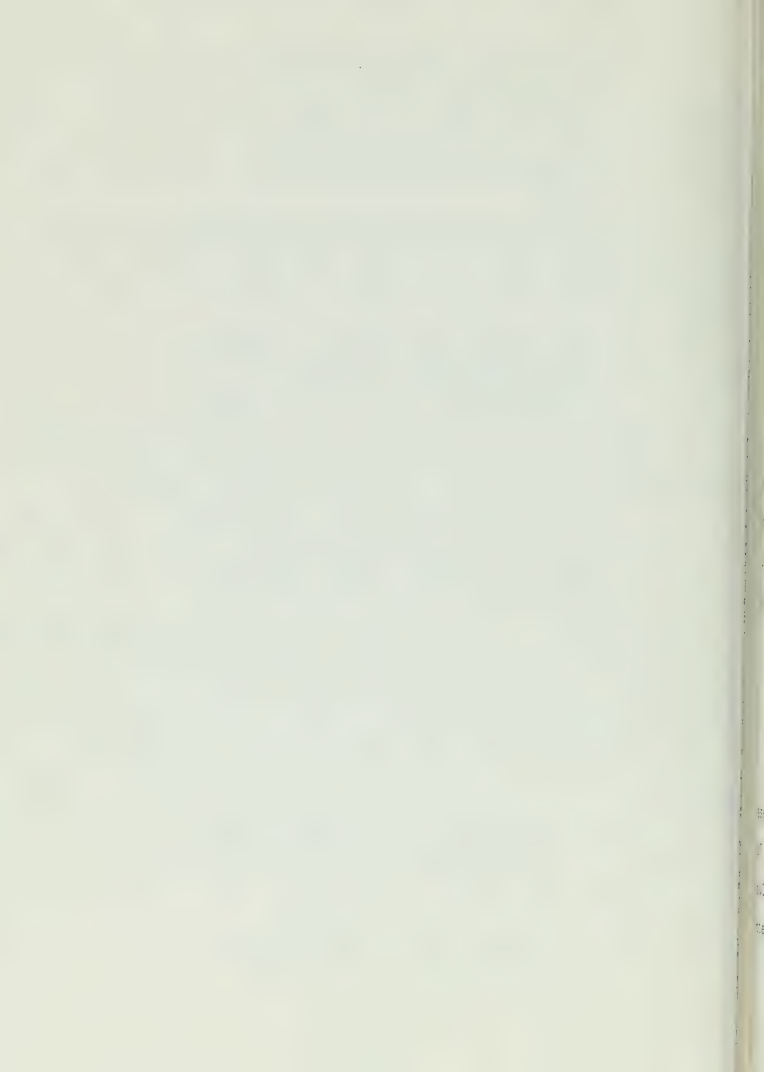
"(h) Assault and Battery - Assault and battery shall be deemed an accident unless committed by or at the direction of the named insured."

Further, there is attached to the policy a typewritten endorsement (R 25, 54, 96, 133) which reads as follows:

"It is hereby agreed that no coverage is afforded by this policy with respect to Assault and/or Battery whether committed by the insured or any employee of the insured."

The question thus clearly becomes whether the allegations of the complaint against the City of Seldovia (R 171-179) there is asserted a claim which is for a loss covered by the policy. More precisely, the three following questions are posed:

1. Is Assault and Battery by Abe Thomas, Police Chief of Seldovia covered by the policy as an accident?
2. Is false imprisonment of Charles McEwen by Abe Thomas covered by the policy as an accident?



3. Is trespass by Abe Thomas covered by the policy as an accident?

Each of these questions will be discussed in turn to show there is no duty to defend the cause of action and thus there is no breach of such duty at the present time.

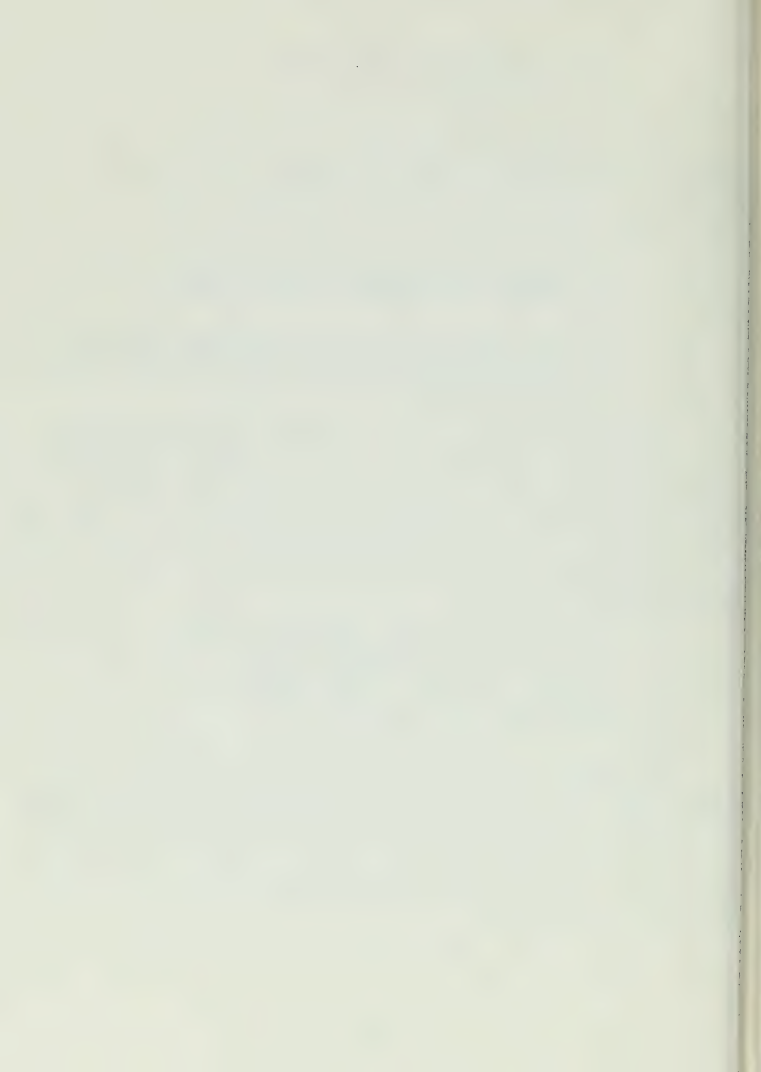
B. Assault and Battery by Abe Thomas is not Within the Coverage of the Policy.

1. The Typewritten Policy Endorsement Controls and Assault and Battery is not Within Coverage of the Policy.

While the original policy provisions contain the statement that assault and battery would be considered an accident unless committed at the direction of the insured (R 30, 59, 82, 18), there is a typewritten endorsement attached to the policy which specifically states:

"It is hereby agreed that no coverage is afforded by this policy with respect to Assault and/or Battery whether committed by the insured or any employee of the insured."
(R 25, 54, 96, 133).

The Supreme Court of Alaska has previously ruled in the case of Pepsi Cola Bottling Co. v. New Hampshire Insurance Co., 107 P.2d 1009, 1012 (Alaska 1965) that the typewritten portion would control as being the more deliberate expression of the intention of the parties.



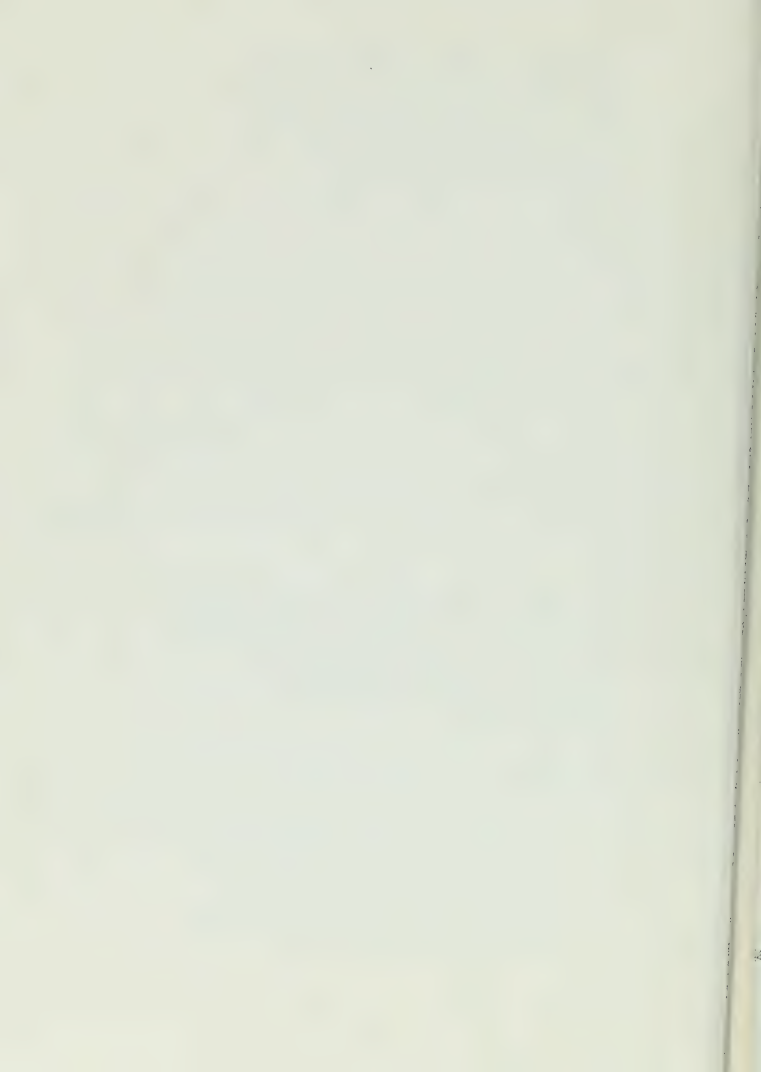
"Appellant refers us to a rule of construction which we are in agreement that where a policy is partly printed and partly written, the writing controls as being the more deliberate expression of the intention of the parties."

Thus, under the endorsement there would be no coverage for assault and battery under the policy. In Argument No. IV of Appellant's Brief [pp. 27-28] appellant contends that the endorsement was not effective until November 4, 1965. This, however, flies in the face of the endorsement itself which states that it was to be effective from August 19, 1965 and the previous admissions of appellant in the trial court that the policy, including said endorsement, was effective at the time of the accident in question. See the following documents and statements:

1. See Amended Complaint, paragraph IX concerning the policy and endorsements thereto being in effect as to September 10, 1965 (R 75A) and Answer of City of Seldovia admitting the attached insurance policy was in effect on the day in question (R 111).

2. See Request for Admissions, October 19, 1966 (R 114) which provided that the City of Seldovia admit:

- (a) That the following attached copy of the General Automobile Liability (policy) contains the identical terms and conditions as the policy of plaintiff in force on the date of the incident in question herein, and further



(b) That such copy is identical in all respects to the policy in force except for signatures which were on the original policy.

No answer was ever filed to the Request for Admissions.

3. The Stipulation of Facts No. 5 (R224) which provided as follows:

That on the 10th day of September, 1965, there was in force and effect a policy of insurance issued by the plaintiff in favor of the defendant City of Seldovia, Policy No. E35-2049-81 and a copy of the policy has been introduced into evidence.

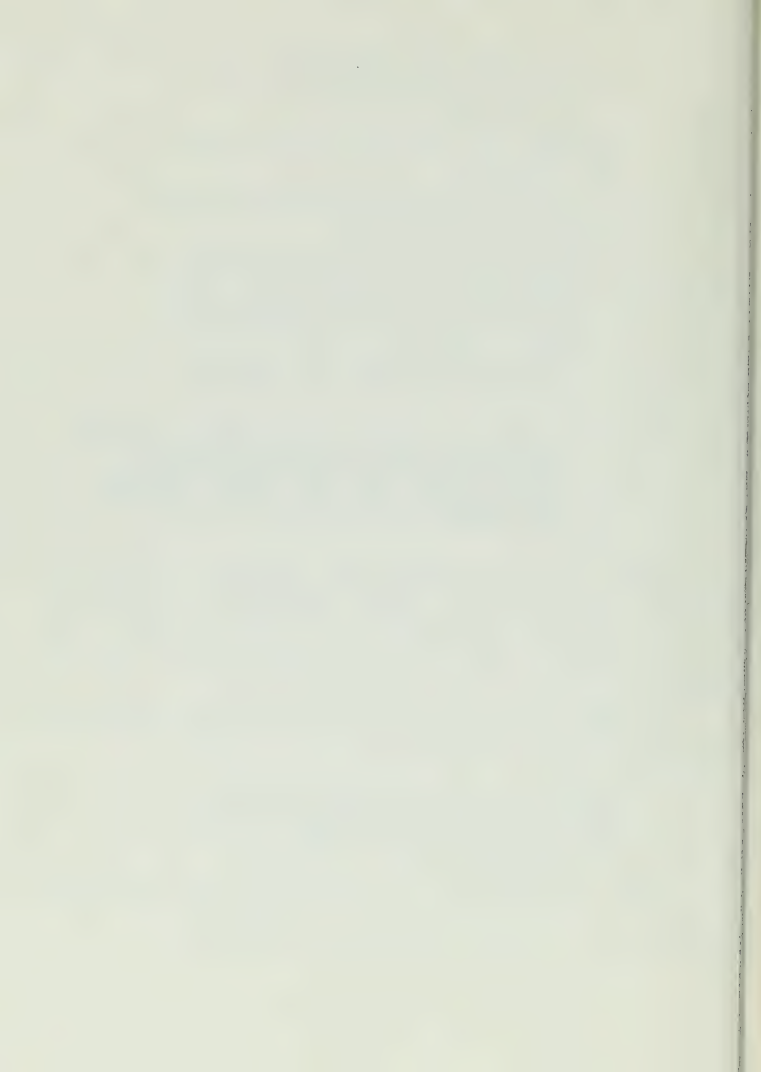
2. Assault and Battery by Abe Thomas as Police Chief of the City of Seldovia Would be "Assault Committed by or at the Direction of the Insured" and Thus Would be Outside the Coverage of the Policy.

In any event, there would be no coverage in the case at bar because the assault and battery was done at the direction of the named insured, Abe Thomas, the Police Chief of the City of Seldovia.

The assault and battery definition provides specifically as follows:

"Assault and battery shall be deemed an accident unless committed by or at the direction of the insured."
(R 30, 59, 82, 118).

In the insuring agreement herein (R 28, 57, 80, 116) the unqualified word "insured" was defined as follows:

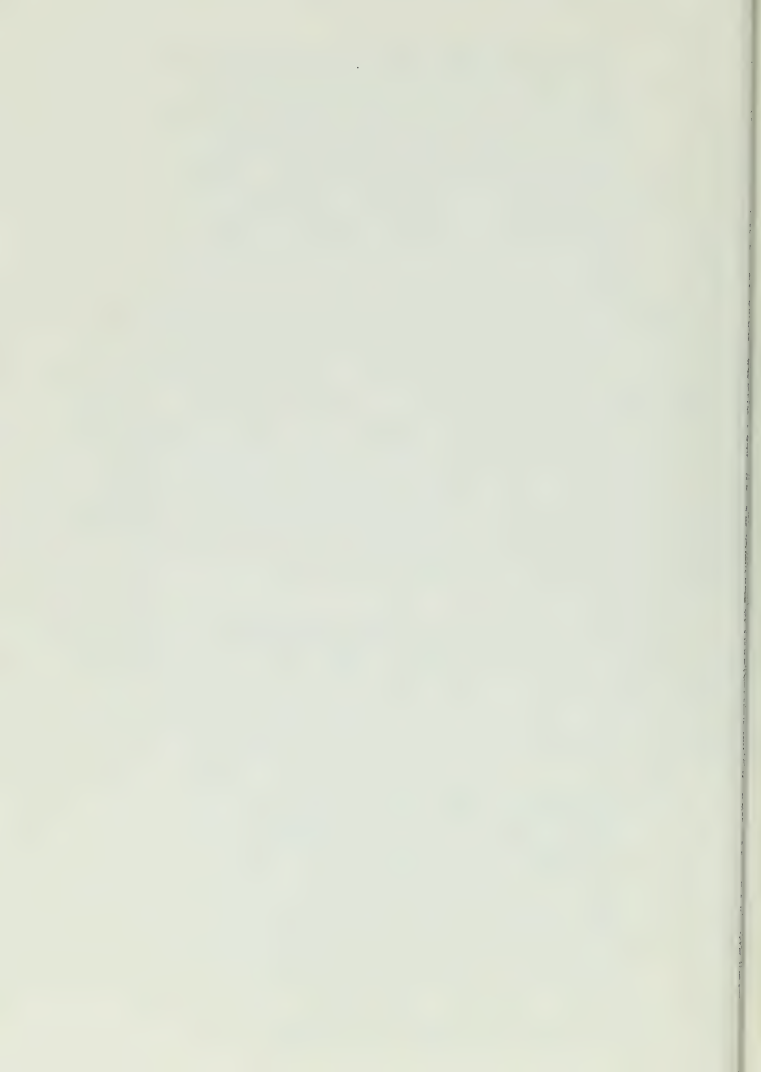


"The unqualified word 'insured' includes the named insured and also includes (1) under coverages B and D any executive officer, director or stockholder thereof while acting within the scope of his duties as such, and any organizational proprietor with respect to real estate management for the named insured, and if the named insured is a partnership, the unqualified word 'insured' also includes any partner thereof but only with respect to his liability as such. . . ."

The police chief of the City of Seldovia was in the course of his duties in arresting an officer as alleged in the complaint and would be one of the few executive officers of the City of Seldovia which cannot act except through its agents. Therefore, the unqualified word "insured" herein would include the chief of police and his actions. Bouis v. Employers' Liability Assurance Corp., 160 So.2d 36, 38 (La. Ct. App. 1963).

An example of this particular doctrine is found in the case of Roberts v. R & S Liquor Stores, Inc., 164 So.2d 533, 535-536 (Fla. Ct. App. 1964) where the District Court of Appeals for the First District stated as follows:

"In each of the two cases above cited, the assault complained of by the plaintiff was committed by an individual occupying the position of a manager in the employment of the insured corporate defendant. In each case the liability policy sued upon excluded from its coverage an assault and battery committed by or at the direction of the insured under the policy. These facts squarely fit the facts in the case we now review. In each case it was held that the policy provided no coverage for

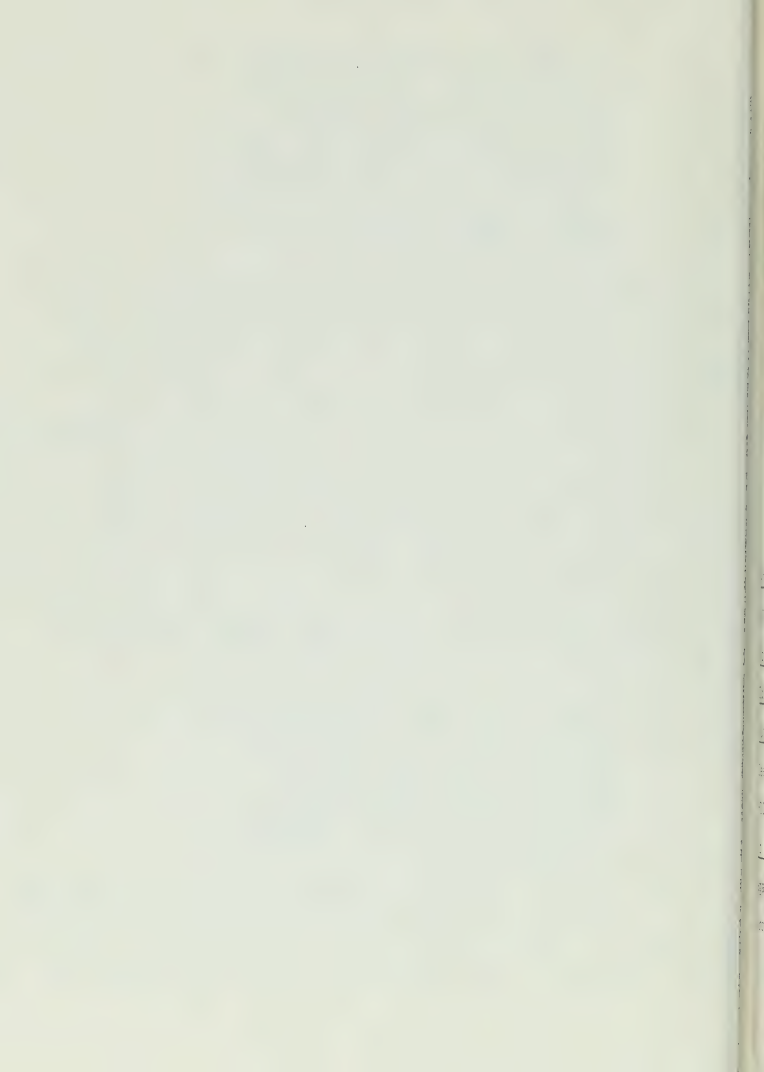


the insured, nor was it liable to the injured plaintiff for the damages suffered by him. Based upon the authorities, we are constrained to the view and so hold, that the trial court in the case sub judice correctly held that the garnishee insurance company was entitled to judgment as a matter of law. The summary judgment appealed herein is accordingly affirmed."

A similar finding was made by the appellate division of the Supreme Court of New York in the case of Greater New York Mutual Ins. Co. v. Perry, 178 N.Y.S.2d 760, 763 (App. Div. 1958) where the appellate division of the New York courts held that the Vice-President of the defendant corporation, the managing agent in charge of the apartment building, who assaulted the tenant in the apartment building was acting on behalf of the corporation and, therefore, the actions came within the prohibition of the policy which stated that assault and battery should be deemed an accident unless committed by or at the direction of the named insured:

"The alleged assault by Frankel, acting as an officer of Hanover and in the course of his duties as Hanover's managing agent, is an assault by the named insured, Hanover, within the meaning of the policy, and by its expressed provisions is excluded from the coverage thereof. . . ."

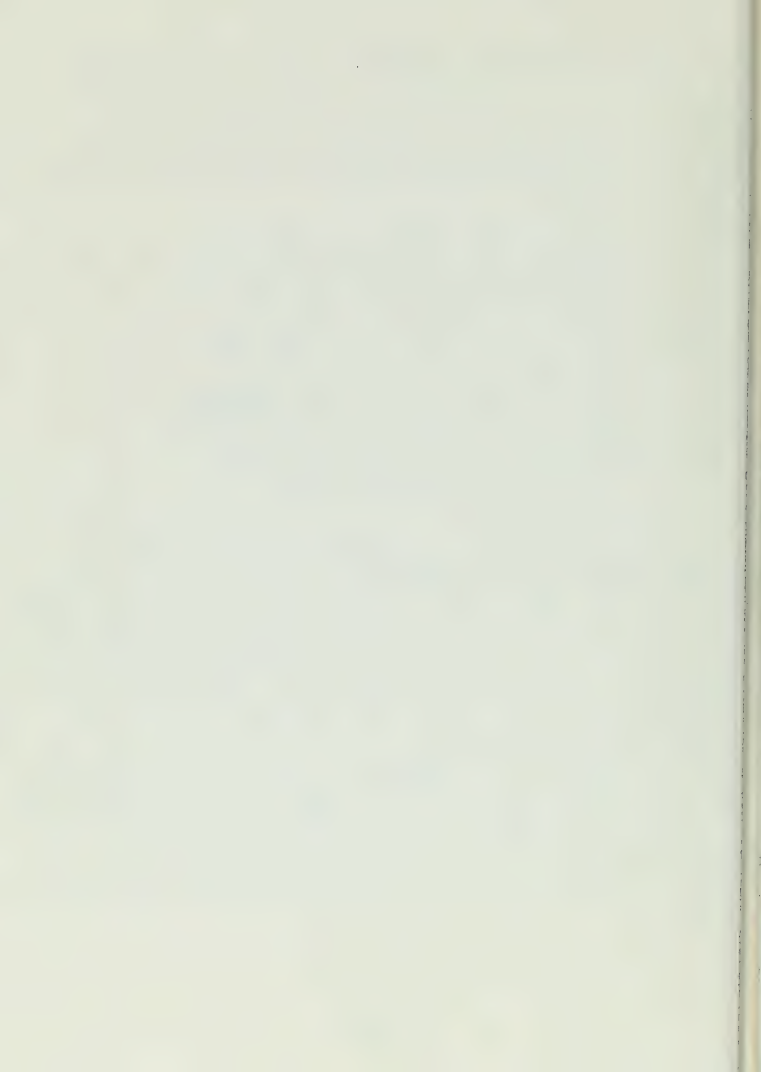
In the case of Portaro v. American Guaranty and Liability Ins. Co., 310 F.2d 897, 899 (6th Cir. 1962) the United States Court of Appeals for the Sixth Circuit, held that Portaro was



an officer of the insured corporation and thus his assault and battery upon a woman patron of a beauty parlor operated by the corporation was not an accident because the assault and battery had been committed by or at the direction of the insured.

" . . . It is clear to us that, as amended, the intention of the policy before us was to protect all included within the meaning of 'insured' against liability for 'occurrences.' It is equally clear to us that when by clause 3(d) which provided that "an assault and battery shall be deemed an occurrence unless committed by . . . the insured." The intention to refuse coverage to Portaro, and insured within the meaning of the policy, for an assault and battery committed by him is manifest."

See also the cases of McCarthy v. Motor Vehicle Accident Indemnification Corporation, 224 N.Y.S.2d 909, 915-916 (App. Div. 1962); DeLuca v. Coal Merchants Mutual Insurance Co., 59 N.Y.S.2d 664 (App. Div. 1945); McLaughlin v. New York Edison Co., 169 N.E. 277, 278 (N.Y. 1929); Farm Bureau Mutual Automobile Ins. Co. v. Hammer, 177 F.2d 796 (4th Cir. 1949). See also Oregon cases of MacDonald v. United Pacific Ins. Co., 311 P.2d 425, 432 (Ore. 1967); Isenhardt v. General Casualty Co. of America, 377 P.2d 26, 28 (Ore. 1962); for cases that it is against public policy to insure persons for their deliberate wrongs.



C. False Imprisonment and Trespass are not
Accidents Within the Policy Terms and
Thus There is no Duty to Defend Such
Counts.

Appellant makes no mention of Counts II and III of the complaint and apparently concedes they would be outside the coverage of the policy. The following section is added for the sake of completeness and is not intended to be more than a simple outline of the problem and the correctness of the concession.

Dean Prosser in his work Prosser On Torts § 12 on page 50 (3rd Ed. 1964) notes that there must be an intent to confine before there is false imprisonment.

"There is no false imprisonment unless the defendant intends to cause a confinement, whether of the plaintiff or another. There may, however, be liability for any negligence in such a case, if actual damage results. It has been held that a mere incidental confinement due to acts directed at another purpose as, for instance, locking the door with the plaintiff inside for the sole purpose of keeping others out is not a sufficiently important invasion of the plaintiff's interests to require the protection of the law."

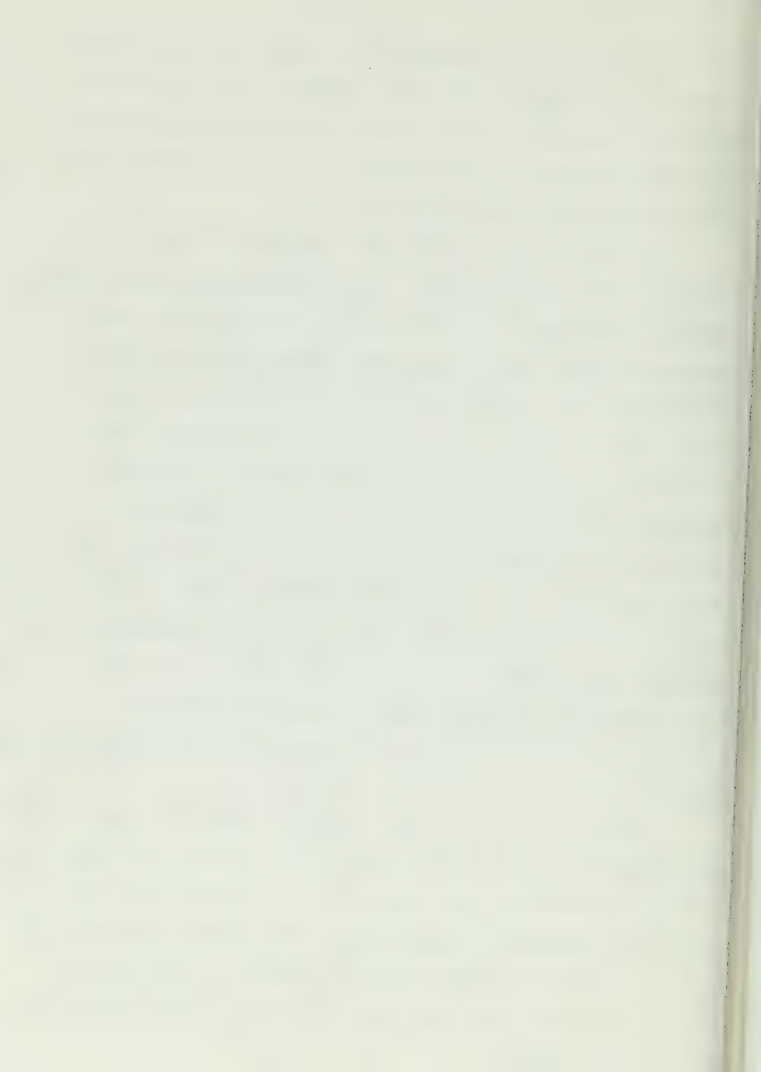
A similar intentional act is pleaded in the case at bar for the trespass alleged in Count III See Restatement of Torts, § 158, on page 359.

These intentional acts by Thomas as agent for the City of Seldovia, are not covered by the insurance policy which

specifically provides in coverage B of the insurance policy of the City of Seldovia "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person and caused by accident." (R 28).

See cases where intentional trespass held not an accident within policy terms: M. R. Thomason v. United States Fidelity & Guaranty Co., 248 F.2d 417, 419 (5th Cir. 1957); Langford Electric Co. v. Employers Mutual Indemnity Corp., 297 N.W. 843, 847 (Minn. 1941); See 23 Insurance Counsel Journal 33, 37 (1956); case where false imprisonment was an intentional act not within coverage: Lively v. City of Blackfoot, 416 P.2d 27, 30-31 (Idaho 1966); Capachi v. Glenn Falls Insurance Co., 30 Cal. Rptr. 323, 326 (Ct. App. 1963); and cases where assault and battery is held not to be an accident under similar terms: Johnson v. Combined Insurance Co. of America, 158 So.2d 63, 65 (La. Ct. App. 1963); Cordon v. Indemnity Ins. Co. of North America, 123 F.2d 363, 364 (6th Cir. 1941); Bowen v. Lloyds Underwriters, et al, 162 N.E.2d 65, 66 (Mass. 1959).

In any event, the actual terms of Counts II and III of the complaint make it clear that the suit is for the intentional actions of Abe Thomas in taking Charles McEwen into police custody by deliberate trespass and arrest which violated McEwen's rights. The fact that he resisted the arrest only made his actions also intentional, but has no real bearing on the coverage problem.



Since there would be no duty to defend for such allegations, it follows that there has been no breach of contract for the failure to defend. The trial court was thus correct herein in its decision and said decision should be upheld on appeal.

CONCLUSION

For the forgoing reasons, it is urged that the decision of the District Court for the District of Alaska should be affirmed.

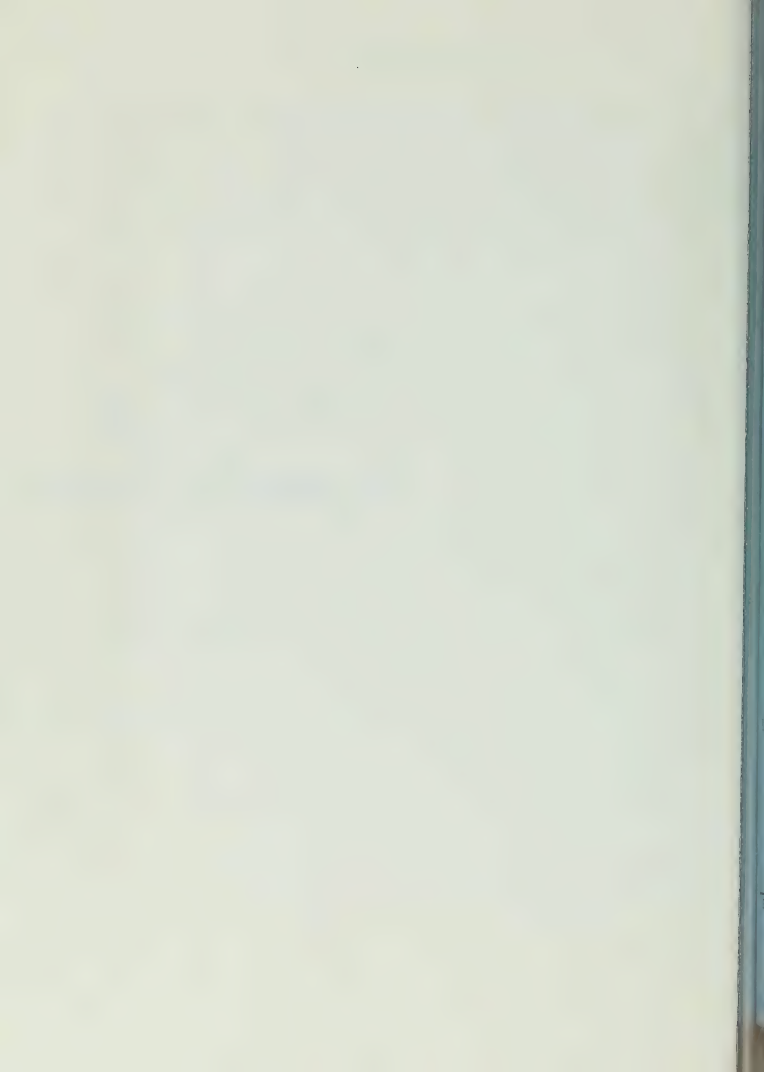
DATED: July 2, 1968

Respectfully submitted,

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GANTZ & CLARK
Attorneys for Appellee
Employers' Liability
Assurance Corporation, Ltd.

By 

ROBERT C. ERWIN



No. 22689

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DESERT OUTDOOR ADVERTISING, INC., a corporation,
SEYMOUR BUXBOM, and CAROL BUXBOM,

Appellants,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California, RAYMOND C. SMITH, Building Director of the County of Riverside, C. E. CRABTREE, Land Use Administrator of the County of Riverside, ROSS DONLEY, BYRON MORTON, DISTRICT ATTORNEY of the County of Riverside, Municipal Court, Riverside Judicial District, Municipal Court, Indio Judicial District, the Board of Supervisors of the County of Riverside, WILLIAM E. JONES, PAUL J. ANDERSON, NORMAN J. DAVIS, RAYMOND SEELEY and FLOYD MCCALL as Supervisors of said County, and RIVERSIDE COUNTY PLANNING COMMISSION,

Appellees.

APPELLANTS' OPENING BRIEF.

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FILED

MAY 1968

WALDRON & BRYANT, CLERK

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Appellees.

APPELLANTS' OPENING BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a decision of the United States District Court for the Central District of California denying an application for injunction and staying further proceedings.

The District Court had jurisdiction pursuant to the following:

- (1) 28 U.S.C. Section 1331(a): "the district courts shall have original jurisdiction of all civil

actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs and arises under the Constitution, laws, or treaties of the United States.”

(2) 28 U.S.C. Section 1337: “The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

Jurisdiction over the instant appeal is conferred upon this Court by 28 U.S.C. Section 1292(a)(1) which provides:

“(a) The courts of appeal shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;”.

II.

STATEMENT OF THE CASE.

Appellants, Desert Outdoor Advertising, Inc., Seymour Buxbom and Carol Buxbom (hereinafter referred to as “Desert Outdoor”) have owned and maintained, since prior to 1960, approximately 62 outdoor advertising signs at strategic locations along the federal Interstate and federal-aid primary highways in the County of Riverside [R. T. p. 20, lines 13-18]. The yearly income derived by Desert Outdoor from the

rental of said signs is in excess of \$50,000 [R. T. p. 22, line 13].

On September 22, 1960 the County of Riverside, its Board of Supervisors, employees and subdivisions (hereinafter referred to as "Riverside") enacted amendments to the zoning ordinance which provided in part: (1) that all of the unincorporated territory of Riverside not included under any other zone shall be in the M-3 zone; (2) that outdoor advertising signs and structures shall not be permitted in the M-3 zone; (3) a non-conforming outdoor advertising sign or structure may be continued and maintained for a period of five years and (4) any violation of the provisions of said ordinance shall be deemed a misdemeanor, punishable by a fine not to exceed \$500 or by imprisonment in the County jail not to exceed 6 months, or by both [R. T. p. 19, line 29, to p. 20, line 10]. Approximately 90% of the area in Riverside is zoned M-3 and all of Desert Outdoor's signs are located in the M-3 zone [R. T. p. 34, lines 4-8].

Under the provisions of the above-mentioned ordinance all of the outdoor advertising signs owned by Desert Outdoor were lawfully in existence on September 1, 1965, the effective date of 23 U.S.C. Section 131(e) (Highway Beautification Act of 1965) [R. T. p. 20, lines 20-26], and on October 22, 1965, the effective date of 23 U.S.C. Section 131(g) [R. T. p. 22, line 31, to p. 23, line 1].

Commencing in the early part of 1966 and continuing to the present time, Riverside has (1) filed and prosecuted two criminal complaints against Desert Outdoor charging said Appellants with the unlawful use of land in the M-3 zone for outdoor advertising signs and structures; (2) threatened to initiate other and further criminal actions against Desert Outdoor for the same purported unlawful use [R. T. p. 20, line 28, to p. 21, line 9]; (3) mailed threatening letters to Desert Outdoor and to individuals who rent their land to Desert Outdoor [R. T. p. 21, lines 10-18 and p. 30 and p. 31] and (4) discriminated against Desert Outdoor in the application of said ordinance [R. T. p. 21, lines 19-25 and p. 34, lines 19-28].

On July 7, 1966, Appellants brought a civil action against Riverside to restrain said County, its employees and agents from doing the above-mentioned acts. A preliminary injunction was issued on July 22, 1966 restraining the further criminal prosecution of Appellants for the alleged violation of the said zoning ordinance as it pertained to outdoor advertising signs [R. T. p. 34, line 29, to p. 35, line 9]. Said preliminary injunction is still in full force and effect. In April, 1967, Riverside commenced writing threatening letters to real property owners who have outdoor advertising signs owned by Desert Outdoor located upon their property. Said letters require the removal of said signs under the threat of criminal prosecution [R. T. p. 35, lines 10-21]. Desert Outdoor brought another action against Riverside for the more recent acts (Riverside Superior Court

No. Indio 10089) and applied for a restraining order which was denied [R. T. p. 36, lines 7-12].

On September 1, 1967, Desert Outdoor filed the first amended complaint for injunction and declaratory relief [R. T. pp. 18-32], order to show cause for a preliminary injunction [R. T. pp. 43-44] and affidavit of Carol Buxbom in support of order to show cause for a preliminary injunction and points and authorities in support thereof [R. T. pp. 33-42]. The order to show cause came on for hearing on September 11, 1967 at which time the attorney for Riverside made an oral motion to dismiss; the hearing was continued to September 25, 1967, to permit counsel to prepare additional points and authorities regarding the District Court's jurisdiction and a three-Judge Court [R. T. pp. 52-72 and pp. 45-49].

Following the hearing and on October 9, 1967, the District Court made its "Order Denying Injunction and Staying Further Proceedings", expressing the view that out of "appropriate regard 'for the rightful independence of state governments' . . . 'that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals.' . . ." and citing *Chicago in Fieldcrest Dairies, supra*. The District Court also stated that 23 U.S.C. 131 provides that said signs be "lawfully" in existence and that this was a question of state law [R. T. p. 73, line 28, to p. 74, line 23].

VI.

ARGUMENT.

1. The Highway Beautification Act of 1965 Transcends State and Local Interests in the Interest of Providing Nationwide Regulation and of Protecting the Public Investment, and Is Not Limited by Conflicting Provisions of State or Local Law.

Title 28 U.S.C. Section 1337 provides that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 23 U.S.C. Section 131, the Highways Beautification Act of 1965 is such an act. In Section 131(a), Congress declared: "that the erection and maintenance of outdoor advertising signs, displays and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel and to preserve natural beauty."

It has been held that the Federal Aid Highway Act, 23 U.S.C. 101 (under the same title as the Highway Beautification Act) being a valid exercise of federal power, is the supreme law of the land which cannot be limited by conflicting provisions of State law.

United States v. Carmack, 329 U.S. 230 (1946);
United States v. Certain Parcels of Land, 209
F. Supp. 483 (D.C. Ill. 1962) Affirmed 314
F. 2d 825;

Harney v. United States, 306 F. 2d 528 (CA Mass. 1962) cert. den. 83 S. Ct. 254.

The general sovereign immunity of the federal government from state or local control of its governmental functions is established under the Supremacy Clause of Article VI of the Constitution.

. *Mayo v. United States*, 319 U.S. 441;

Maun v. United States, 347 F. 2d 970 (9th Cir. 1965).

In the *Maun* case, *supra*, one of the questions presented was whether the Atomic Energy Commission could construct and operate an overhead (rather than underground) electric transmission line in disregard of local authority and regulations governing said lines. The Court stated that the activities of the AEC in connection with the construction and operation of the said lines are "wholly immune from local control." (347 F.2d 970, 974). The Court referred to 23 U.S.C. Section 131 in connection with the federal eminent domain power and stated: "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (quoting from *Burman v. Parker*, 348 U.S. 26, 33).

2. The Acts of the County of Riverside Are in Direct Conflict With the Provisions of 23 U.S.C. §131(e) and §131(g) and Should Be Enjoined.

23 U.S.C. 131(e) provides in part: "Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970."

The amendments by Riverside to its zoning ordinance on September 22, 1960 banned the future erection of outdoor advertising signs from the M-3 zone in Riverside (approximately 90% of the area in the County); but the said amendments permitted any outdoor advertising signs existing at that time to be maintained as a nonconforming use for a period of five (5) years or until October 22, 1965. [R. T. p. 19, line 29, to p. 20, line 10]. All of Desert Outdoor's signs are located in the said M-3 zone [R. T. p. 34, lines 4-8].

Therefore, all of the said signs owned by Desert Outdoor were "lawfully" in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, and should "not be required to be removed until July 1, 1970", pursuant to 23 U.S.C. 131(e).

The Highway Beautification Act also provides for just compensation to be paid for the removal of said signs, 23 U.S.C. Section 131(g) provides in part:

"(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays and devices—

“(1) those lawfully in existence on the date of enactment of this subsection,” (October 22, 1965).

Unless Riverside is restrained from prosecuting Desert Outdoor, Seymour Buxbom and Carol Buxbom and from threatening to prosecute landowners renting their property to said Appellants, the outdoor advertising signs owned by Desert Outdoor will be removed prior to July 1, 1970 and without the payment of just compensation due to the said threats and acts of the County of Riverside. The County has commenced the prosecutions and sent threatening letters in direct contravention to 23 U.S.C. Section 131(e) and Section 131(g).

3. The Authority Cited by the District Court in Denying the Injunction Is Not Applicable Where the Federal Issue Is of a Non-Constitutional Nature.

The District Court cited *Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942) as authority for its order denying the injunction and staying further proceedings. In this case there was no federal statute applicable to the facts; Fieldcrest Dairies was attempting to establish new business in the City of Chicago whose ordinance prevented the use of the type of container used by said Dairy. Desert Outdoor already owns 62 advertising signs in Riverside which come within the purview of 23 U.S.C. 131.

4. Federal Courts Shall Determine the Entire Controversy Including Local Questions Where the Federal Issues Are of a Non-Constitutional Nature.

Where the federal issues are of a non-constitutional nature and Congress has plainly provided for federal jurisdiction, federal courts shall determine the entire controversy including an underlying local question based on local law.

Proper v. Clark, 337 U.S. 472 (1949);

Markham v. Allen, 326 U.S. 490 (1946);

Hurn v. Oursler, 289 U.S. 238 (1932).

Although the zoning ordinance of the County of Riverside is involved herein, there is but one essential "unlawful violation of a right which the facts show" (*Hurn v. Oursler, supra*): the destruction and loss of Desert Outdoor's sign business by the acts of the County of Riverside which, on its face and as applied to Desert Outdoor, violates the provisions of 23 U.S.C. Sections 131(e) and 131(g).

A federal question will not be held in abeyance and the parties remitted to the state forum where no state ruling on the local law could settle the federal questions that would remain or where there is no adequate remedy in the state forum.

Public Utilities Comm. of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943).

5. The Equity Jurisdiction of the Federal Courts Will Be Invoked to Enjoin the Bringing of Local Criminal Actions Where Is Is Essential to Protect Rights Asserted.

The federal courts have not been reluctant to enjoin the application of a state or county law and criminal prosecutions brought thereunder where it appears that unless the local government is restrained the applicant will suffer exceptional and irreparable injury, especially to his property rights.

Dombrowski v. Pfister, 380 U.S. 479 (1965);
Utah Fuel Co. v. Nat'l Bit. Coal Comm., 306 U.S. 56 (1939);

Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913);

Birch v. McColgan, 39 F. Supp. 358 (DC Cal. 1941);

Alesna v. Rice, 69 F. Supp. 897 (DC Hawaii 1947);

Andrew G. Nelson, Inc. v. Jessup, 134 F. Supp. 221 (DC Ind. 1955);

Beeler v. Smith, 40 F. Supp. 139 (DC Ky. 1941);

Missouri-Kansas-Texas R. Co. v. Williamson, 36 F. Supp. 607 (1941);

Wilder v. Reno, 39 F. Supp. 404 (Pa. 1941).

Even under California law, where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement; the police power which jus-

tifies the taking of the right to engage in a business is to that extent unreasonable and unjustifiable.

Crittenden v. Superior Ct. of Mendocino County, 39 Cal. Rptr. 380, 392 P. 2d 692 (1964);

MacLeod v. City of Los Altos, 6 Cal. Rptr. 326, 182 Cal. App. 2d 364 (1960);

Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1931).

Unless the County of Riverside, its employees and agents are restrained from prosecuting and threatening to prosecute Desert Outdoor, Seymour Buxbom, Carol Buxbom and the landowners who lease their land to said appellants, all of the outdoor advertising signs owned by Desert Outdoor will be caused to be removed or destroyed under such prosecutions and threats thereof. Desert Outdoor originally sought relief in the Superior Court of the County of Riverside. This court has refused to recognize the federal statute (23 U.S.C. 131) or Desert Outdoor's property rights even though it is clear that the said County would suffer no injury in the event a preliminary injunction were issued maintaining the *status quo*.

6. Conclusion.

For the foregoing reasons, Appellants submit that the decision of the Court below should be reversed, with directions to hear the application for injunction on its merits.

Respectfully submitted,

WALDRON & BRYANT,

By KENNETH A. BRYANT,

Attorneys for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH A. BRYANT.

No. 22689.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

DESERT OUTDOOR ADVERTISING, INC., a corporation,
SEYMOUR BUXBOM, and CARL BUXBOM,

Appellants,

v/s.

COUNTY OF RIVERSIDE, a political subdivision of the
State of California, RAYMOND C. SMITH, Building Di-
rector of the County of Riverside, C. E. CRABTREE, Land
Use Administrator of the County of Riverside, ROSS DON-
LEY, BYRON MORTON, DISTRICT ATTORNEY of the
County of Riverside, Municipal Court, Riverside Judicial Dis-
trict, Municipal Court, Indio Judicial District, the Board of
Supervisors of the County of Riverside, WILLIAM E.
JONES, PAUL J. ANDERSON, NORMAN J. DAVIS,
RAYMOND SEELEY and FLOYD MC CALL, as Super-
visors of said County, and RIVERSIDE COUNTY PLAN-
NING COMMISSION,

Appellees.

APPELLEES' BRIEF.

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IN THE

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Appellants,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California, RAYMOND C. SMITH, Building Director of the County of Riverside, C. E. CRABTREE, Land Use Administrator of the County of Riverside, ROSS DONLEY, BYRON MORTON, DISTRICT ATTORNEY of the County of Riverside, Municipal Court, Riverside Judicial District, Municipal Court, Indio Judicial District, the Board of Supervisors of the County of Riverside, WILLIAM E. JONES, PAUL J. ANDERSON, NORMAN J. DAVIS, RAYMOND SEELEY and FLOYD MC CALL as Supervisors of said County, and RIVERSIDE COUNTY PLANNING COMMISSION,

Appellees.

APPELLEES' BRIEF.

I.

Statement of Issues.

The only issue involved in the appeal of the order of the trial court in this case is whether the court, acting in equity, abused the wide discretion vested in the court in denying the injunction requested and in staying all further proceedings in the action until final adjudication in the State Court proceedings, now pending, or further order of the court on motion for good cause.

II.

Argument.

In their Opening Brief Appellants have not presented any showing or authority that the trial court, acting in equity, abused its discretion by following the established *doctrine of abstention*. Under the *doctrine of abstention* federal courts, exercising wide discretion, restrain their authority because of scrupulous regard for the rightful independence of State government and for smooth working of the federal judiciary. *Galfas v. City of Atlanta*, 193 F. 2d 931; *Palomar Holding Co. v. County of San Mateo*, 283 F. 2d 390.

The brief further fails to present, identify or offer any considerations which provide an exception to the *doctrine of abstention*. The assertion of claims of deprivations of civil rights and of irreparable loss are but unsupported conclusions on the part of plaintiff and affect no abrogation of the rule.

Any rights of plaintiffs to maintain billboards in the County of Riverside must be lawfully established under the ordinance complained of, as the District Court properly held in its order denying an injunction and staying further proceedings. [R. T. p. 73, line 28, to p. 74, line 23.] This ruling is in strict accord with the established federal policy which choose state courts as the preferable forum for adjudication of the question whether local statutes offend the Federal Constitution and statutes. The proper forum for determination of lawfulness under local ordinances is the State Court.

Shipman v. DuPre, 339 U.S. 321, 70 S. Ct. 640, 94 L. Ed. 877; *Galfas v. City of Atlanta*, *supra*.

The decision of the District Court that the signs must be lawfully in existence under state law is clearly supported in Section 131(d) of Title 23 United States Code which provides:

“(d) . . . The states shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the state in this regard will be accepted for the purposes of this act. . . .”

The Highway Beautification Act of 1965 (Public Law 89-285; 23 U.S.C. Sec. 100, *et seq.*) does not afford any rights of suit to the plaintiffs in this case. A casual examination of that law reveals that Congress does not therein directly seek to control or regulate zoning in the state or the location and maintenance of billboards. The act is not operative against the states except to the extent it provides for the withholding of a percentage of federal-aid highway funds apportioned to any state after January 1, 1968, which has not enacted provisions for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising within 660 feet of the right of way of such roads. Nowhere in the law is the individual directly granted rights of suit or billboards, however and whenever erected, declared lawful; nor does the law provide or indicate federal jurisdiction to decide such matters. In *Gregg v. Winchester*, 173 F. 2d 512, the Court ruled that, under circumstances such

as in this case where the complaint is practically a duplicate of the one filed in the State Courts, where the issues are the same, the relief asked is the same, the parties and attorneys are the same, that "a sound respect for the independence of state action *requires the federal equity court to stay its hand.*"

Respectfully submitted,

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TILDEN L. BROOKS,
Deputy County Counsel,

STEVEN A. BROILES,
Deputy County Counsel,

By TILDEN L. BROOKS,
Attorneys for Appellees.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

TILDEN L. BROOKS

No. 22689

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United States Court of Appeals

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SEYMOUR BUXBOM, and CAROL BUXBOM,

Appellants,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California, RAYMOND C. SMITH, Building Director of the County of Riverside, C. E. CRABTREE, Land Use Administrator of the County of Riverside, ROSS DONLEY, BYRON MORTON, DISTRICT ATTORNEY of the County of Riverside, Municipal Court, Riverside Judicial District, Municipal Court, Indio Judicial District, the Board of Supervisors of the County of Riverside, WILLIAM E. JONES, PAUL J. ANDERSON, NORMAN J. DAVIS, RAYMOND SEELEY and FLOYD McCALL as Supervisors of said County, and RIVERSIDE COUNTY PLANNING COMMISSION,

Appellees.

APPELLANTS' REPLY BRIEF.

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FILED

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No. 22689

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Appellees.

APPELLANTS' REPLY BRIEF.

ARGUMENT.

I.

The Doctrine of Abstention Is an Extraordinary Exception to the Duty of a District Court to Adjudicate a Controversy Properly Before It.

Appellees argue that the District Court did not abuse his discretion in applying the doctrine of abstention and thereby denying the injunction and staying further proceedings.

The fallacy of this argument is that it is contrary to the federal law, especially where a federal statute (Highway Beautification Act) is to be interpreted and there is a showing of irreparable injury to the applicants for the injunction in the event of denial.

“The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only, in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.”

Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959).

The federal courts have not been reluctant to abstain on the ground of avoiding the hazard of friction in federal-state relations in a great number of governmental activities carried on by the States and their Subdivisions which have been brought into question in the District Courts:

- (1) *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964) (action to enjoin the state liquor authority from interfering with business of selling liquor to departing international airline travelers);
- (2) *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (similar question as *Hostetter*, *supra*);
- (3) *Allegheny County v. F. Mashuda Co.*, *supra* (questioning power of state subdivision to condemn property for a private purpose);

- (4) *Toomer v. Witsell*, 334 U.S. 385 (1947) (question of state's power to regulate fishing in its waters);
- (5) *Public Utilities Commission v. United States*, 355 U.S. 534 (1958) (questioning state's power to regulate intrastate trucking rates);
- (6) *Meredith v. Winter Haven*, 320 U.S. 228 (1943) (question of city's power to issue certain bonds without a referendum);
- (7) *Chicago v. Atchison, T. & S.F.R. Co.*, 347 U.S. 77 (1958) (questioning state's power to license motor vehicles);
- (8) *Truax v. Raich*, 239 U.S. 33 (1915) (questioning state's anti-alien labor law).

A. The District Court Did Not Look to the Merits of the Application for Injunction.

The District Court in this case apparently did not consider the strong probability that the Appellants could lose their entire business in the event the County of Riverside were not restrained from further prosecuting Appellants for the maintenance of their outdoor advertising signs; the District Court did not rule on the merits of the request for an injunction out of regard for the "rightful independence of state governments" and because it is a "permissible policy for the federal chancellor to stay his hand in the absence of an authoritative and controlling determination by the state tribunals", citing *Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942).

**B. None of the Cases Cited by Appellees Involved
Irreparable Injury to the Applicant for Injunction.**

In both cases cited by Appellees, *Galfas v. City of Atlanta*, 193 F. 2d 931 and *Palomar Holding Co. v. County of San Mateo*, 283 F. 2d 390, the District Court looked to the merits of the applicants' request for an injunction. In the *Galfas* case the District Court found "That no action was threatened except such a trial of Galfas and that the plaintiffs showed no such imminent danger of irreparable injury as to entitle them to injunctive relief." (193 F. 2d 931 at page 934). The within Court stated in comparing the facts of the *Palomar* case with *Truax v. Raich*, *supra*:

"The unusual circumstances there (*Truax*) were such that the constitutional issue in all probability would never have reached the state courts and that federal intervention was essential if property rights of appellants were to be safeguarded. We do not find such circumstances in this case." (283 F. 2d 390 at page 391.)

Nor was there a serious question of irreparable injury in the *Chicago v. Fieldcrest Dairies* case, *supra*. Fieldcrest Dairies apparently would not have lost its entire business in the event the District Court failed to declare invalid the Chicago ordinance prohibiting said dairy from selling milk in "Pure-Pak" paper containers within the City.

The pleadings in the case before the Court clearly show that appellants' entire business is in jeopardy if the County of Riverside is not enjoined from further prosecuting and threatening to prosecute appellants and the landowners who lease their land to said appellants.

II.

It Is the Practice in Federal Courts to Decide, When Necessary, Questions of State Law, Where a Case Involves Non-Constitutional Federal Issues.

It has from the first been deemed to be the duty of the Federal Courts to decide questions of state law whenever necessary to the rendition of a judgment and, in the absence of some recognized policy or defined principle, denial of that opportunity by Federal Courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

Meredith v. Winter Haven, supra;

Propper v. Clark, 337 U.S. 472 (1949);

Hurn v. Oursler, 289 U.S. 238 (1932);

Chicago v. Atchison, T. & S.F.R. Co., supra.

A. The Language of the Riverside Ordinance Is Not Ambiguous or Difficult to Interpret.

What is more, there is no difficult or uncertain question of state law presented in this case. The amendments by the County of Riverside to its zoning ordinance on September 22, 1960, banned future erection of outdoor advertising signs from its M-3 zone and permitted any of said signs existing at that time to be maintained as a nonconforming use for a period of five (5) years or until October 22, 1965.

23 U.S.C. 131 (e) provides in part:

“Any sign, display, or device lawfully in existence along the Interstate System or the Federal-

aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970."

All of appellants' outdoor advertising signs were, under the language of the Riverside Ordinance, clearly "lawfully in existence" on September 1, 1965.

Where the language of the municipal law or regulation itself contains no ambiguity which calls for interpretation, and where remission to the state courts would involve substantial delay, the District Court, even in cases where there is no issue of irreparable injury, have assumed jurisdiction in spite of the argument that the case be held until the state courts adjudicated the issue of state law.

Chicago v. Atchison, Topeka & Santa Fe R. Co., supra;

Toomer v. Witsell, supra.

B. The Riverside Ordinance, as Applied to Appellants, Constitutes a Taking of Appellants' Property Contrary to 23 U.S.C. Section 131(g), the State Law and the Federal Constitution.

23 U.S.C. Section 131 (g) provides in part:

"(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays and devices—

(1) Those lawfully in existence on the date of enactment of the subsection," (October 22, 1965).

Section 5288.3a of the California Business and Professions Code provides in part as follows:

“5288.3a. Each removal ordered by the director, on or after the effective date of this section of any of the following advertising displays which is not as of that date in conformity with the provisions of this article shall be deemed a removal under Section 5288.2a and shall be deemed to constitute a taking, within the meaning of the Highway Beautification Act of 1965, subdivision (g) of Section 131 of Title 23 of the United States Code, as in effect October 22, 1965, of all right, title and interest, including any leasehold interest, of the owner of the advertising display and of the right of the owner of the real property on which the advertising display is located to erect and maintain such advertising display thereon:

(a) Advertising displays lawfully in existence on October 22, 1965.”

The effect of the Riverside Zoning Ordinance and its criminal provisions, as applied to appellants, is to force appellants, under threat of criminal prosecution, to remove all of their outdoor advertising signs without just compensation. This would result in the destruction of a business whose income is in excess of \$50,000.00 per year.

All of appellants' signs are located at strategic places along the federal interstate and federal-aid primary highways in the County of Riverside and therefore are specifically covered by the Highway Beautification Act and the California Business and Profession Code which refers to said federal act. Unless the County of

Riverside is restrained from enforcing its zoning ordinance against appellants and in direct contravention to the above mentioned federal and state acts appellants will lose their entire business without any compensation and without due process.

In *Gregg v. Winchester*, 173 F. 2d 512, cited by the County, the facts were much different than in the instant case. In this case no criminal penalties for infractions were involved, nor was there any showing of irreparable injury or loss of business on the part of the applicants for injunction.

Conclusion.

For the foregoing reasons, Appellants submit that the decision of the Court below should be reversed with directions to hear the application for injunction on its merits.

Respectfully submitted,

WALDRON & BRYANT,

Attorneys for Appellants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

HARRAH'S CLUB, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,689

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

HARRAH'S CLUB, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I.

In its brief, pp. 49-55, the Company repeats the argument made to the Board that the Trial Examiner committed prejudicial error by taking judicial notice of the facts found in the earlier Harrah's Club case, 150 NLRB 1702, enforced 362 F. 2d 425 (C.A. 9), cert. denied, 386 U.S. 915. We anticipated this defense in our main brief, p. 19, fn. 14, by pointing out that the Supreme Court has held to the contrary. Commissioner v. Sunnen, 333 U.S. 591, 598. Accord: N.L.R.B. v. Brown & Root, Inc., 203 F. 2d 139, 146 (C.A. 8). Under the doctrine of collateral estoppel by judgment, in a subsequent proceeding between the parties to the original suit or their privies, matters which were actually determined in and necessary to the first decision may be used as an affirmative part of a party's case. Hyman v. Regenstein, 258 F. 2d 502, 509-510 (C.A. 5), cert. denied, 359 U.S. 913. This rule has been consistently accepted in

proceedings before administrative bodies, including the National Labor Relations Board. See, e.g., United States v. Pierce Auto Freight Lines, 327 U.S. 515; Federal Trade Commission v. Cement Institute, 333 U.S. 683, 705; N.L.R.B. v. Lee-Rowan Co., 316 F. 2d 209, 211 (C.A. 8), cert. denied, 375 U.S. 827; Paramount Cap Mfg. Co. v. N.L.R.B., 260 F. 2d 109, 113-114 (C.A. 8); N.L.R.B. v. Reed & Prince Mfg. Co., 205 F. 2d 131, 139-140 (C.A. 1), cert. denied, 346 U.S. 887.^{1/}

Here, the Trial Examiner and the Board took judicial notice of the facts of the first Harrah's Club case, and relied upon certain facts there found to shed light upon the events which occurred shortly thereafter, i.e., the withdrawal of tokens from the stage technicians and the discharges of Cole and Lovelady. By using the specific facts of the first decision to shed light upon the purpose and character of subsequent events, the Board has not relied upon past unfair labor practices as the sole basis for finding other unfair labor practices. The Trial Examiner and the Board have simply used events which occurred prior to those alleged in the complaint as background to help explain the events alleged to be unfair labor practices. This practice has long had judicial approval. N.L.R.B. v. Winn-Dixie Greenville, Inc., 379 F. 2d 954, 959-560 (C.A. 4), cert. denied, 389 U.S. 952; Hendrix Mfg. Co.

^{1/} The only decision expressing a contrary view is N.L.R.B. v. Bill Daniels, Inc., 202 F. 2d 579, 586-587 (C.A. 6), reversed on other grounds, 346 U.S. 918, which the Company cites in its brief. The quotation relied upon is dictum, however, and the sole authority cited for that proposition is 20 Am Jur. 105, § 87. Regardless of the accuracy with which that text formulated and expressed the "general rule" which courts

v. N.L.R.B., 321 F. 2d 100, 103-104 (C.A. 5); N.L.R.B. v. Combined Century Theatres, Inc., 278 F. 2d 306, 307 (C.A. 2); Wheeler v. N.L.R.B., 314 F. 2d 260, 262-263 (C.A.D.C.); N.L.R.B. v. W.R. Hall Distributor, 341 F. 2d 359, 362-363 (C.A. 10). See also Local Lodge No. 1424, IAM v. N.L.R.B., 362 U.S. 411, 416-417. By taking judicial notice of those facts the Trial Examiner merely shortened the process of re-proving them in the instant case.

The unfair labor practices found in the instant case -- the discriminatory withdrawal of tokens and discharges of Cole and Lovelady -- are not, of course, established by the mere showing that the Company had previously engaged in unlawful conduct. But the prior specific threats to take reprisals against the employees and to reduce the crew may be added to the other circumstances proved in the case to support the Board's findings. While not conclusive, "anti-union bias and demonstrated unlawful hostility are proper and highly significant factors for Board evaluation in determining motive." N.L.R.B. v. Dan River Mills, Inc., 274 F. 2d 381, 384 (C.A. 5). Demonstrated unlawful hostility and bias do not have to be found within the period encompassed by the complaint. Hence, we submit, the Trial Examiner properly took judicial notice of the facts of the first Harrah's Club case.

1/ (Cont.)

"ordinarily" apply, a number of exceptions are recognized which the court apparently did not consider. See, e.g., 29 Am Jur. 2d, Evidence § 59; 30 Am Jur, Judgments § 371. In view of the cursory consideration which the Sixth Circuit gave to this area of the law, we submit that Bill Daniels is not entitled to much weight on this point, and that the better view is expressed by the authorities relied on by the Board here and in our main brief.

II.

The Company argues (Br. pp. 48-49) that the Board improperly ordered it to make the stage technicians whole for losses suffered by them by the withdrawal of tokens. The Company insists that the amounts involved are too difficult to estimate, and that the Board's order is punitive.

The mere fact that the compilation of amounts owed to employees may be difficult to ascertain is not a sufficient reason for denying that remedy. Thomason Plywood Corp., 109 NLRB 898, 910; Pacific Intermountain Express, Inc., 107 NLRB 837, 849. Thus, employees have been awarded such hard-to-estimate sums as the cash equivalent of room and board on a ship (American Range Lines, Inc., 13 NLRB 139, 154-155), moving expenses for a family and its effects (Symms Grocer Co., 109 NLRB 346, 349), the use of a demonstrator car (M.J. McCarthy Motor Sales Co., 147 NLRB 605, 609), Christmas bonuses and profit-sharing plans (Oman Constr. Co., 144 NLRB 1534, 1558; N.L.R.B. v. U.S. Air Conditioning Corp., 336 F. 2d 275, 277 (C.A. 6)). Amounts for willful loss of earnings -- that is, estimated earnings a discharged employee should have earned -- are deducted from back pay. N.L.R.B. v. Cowell Portland Cement, 148 F. 2d 237, 246 (C.A. 9); Oman Constr. Co., supra, 144 NLRB at 1537-1538. Similarly, the Board has ordered employers to make whole their employees for loss of tips. Club Troika, Inc., 2 NLRB 90, 94; Willard, Inc., 2 NLRB 1094, 1108. Respondent has shown no reason why a different result is warranted here. Nor will the Company have the burden of making the estimate, for the burden of proof as to the amounts involved will rest upon the General Counsel. N.L.R.B. v. U.S. Air Conditioning Corp., supra, 336 F. 2d at 277. The

Company cannot rationally complain that the Board's order is punitive. It merely restores the status quo ante, which from the employees' standpoint is remedial only -- they receive no windfall by virtue of the Board's order.

III.

The Company argues that its offers of reinstatement to Cole and Lovelady were valid. This contention is without merit.

As explained in our opening brief, an offer of reinstatement which imposes unreasonable conditions upon an employee, including an unusually short reporting time, is invalid. The reason why the Board's opening brief fails to mention "a host of decisions" cited by the Company (Br. pp. 60-70) is that they are clearly inapposite.

What is a reasonable length of time to report for reinstatement is, of course, a matter dependent upon the surrounding circumstances. Thus, in White Sulphur Springs Co. v. N.L.R.B., 316 F. 2d 410, 415 (C.A. D.C.), although the employees were asked to return to work only a few days later, the offers of reinstatement were made on the day after the discriminatory conduct occurred. In Nevada Tank & Casing Co., 131 NLRB 1352, 1353, the Company's offer of reinstatement asked the employees to report or reply within 48 hours. It would appear reasonable to ask an employee to decide within 48 hours whether he is willing to return to work. "The employer certainly /is/ entitled to know where it /stands/. . . " White Sulphur Springs Co. v. N.L.R.B., supra, 316 F. 2d at 415. But if an employee has relocated, found new work and entered into new obligations, sufficient time should be allowed for him to wind up his affairs before

reporting back to his old job.^{2/} In Nashville Display Co., 93 NLRB 1310, 1318, several employees were laid off on January 19. On Saturday, January 21, the Company offered reinstatement to the employees effective January 23. Here again, although the employees were asked to report to work two days later, the layoff had occurred only two days earlier. The employees would have had little opportunity to make plans which would make the specified reporting date unreasonable.

In contrast to the situations in the above cases, the offers of reinstatement in the instant case were made nearly four months after the discriminatory discharges. Both employees had relocated from Stateline, Nevada, to the Bay Area in California. In each case the offer demanded that the employee report for work four days later. We submit that, in these circumstances, the Board quite properly held that the offers of reinstatement imposed unreasonable reporting dates upon the employees. Fred E. Nelson, etc., 102 NLRB 780, 783, enforced 208 F. 230 (C.A. 3); Thermoid Co., 90 NLRB 614, 615-616.

CONCLUSION

For the reasons stated herein, as well as those stated in our opening brief, it is respectfully submitted that a decree should issue

2/ Thus, in Nevada Tank & Casing Co., at least one employee reported to work a month after the offer of reinstatement.

enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and is his opinion of the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

March 1968.

No. 22691 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUL 24 1968

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

FILED

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No. 22691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, *et al.*,

Appellants,

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UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

Statement of the Case.

Appellants disagree with portions of Appellee's Statement.

Appellee has sought to minimize the location of the Barrows claim two full years before the Common Varieties Act of 1955 became effective. Appellants Barrows did more than merely post and record a notice of location—Mr. Barrows worked the claim and sold the mined material long before 1955, at a profit. Sand and gravel mining operations on the claim have been conducted, not since 1960, as suggested by Appellee, but since they began there in 1953. It is true, however, that the Forest Service waited until 1964 before contesting validity of the claim.

The administrative contest which the government elected to file contained three charges of invalidity—none of them the one stated by Appellee.

Contrary to Appellee's statement, the United States charged only one of Appellants with contempt. He was the sublessee-operator of the substantial mining improvements on the claim. That proceeding was dismissed. There has been no contempt and no violation of any order of the Court. Once the operator understood the Court's true intent, all mining ended.

The Statement of Appellee in its Brief points up the true situation.

The United States elected to question validity of the claim eleven years following its location, and after eleven years of its operation as a sand and gravel business, through administrative proceedings, *not* through the courts. Then, three years later, without waiting for a final and reviewable administrative decision of invalidity to be obtained, *it also sued* in the courts to enjoin the mining operation *and* to recover damages for material removed over the period of years the claim had been operated.

ARGUMENT.

I.

The Temporary Injunction Was Not Proper Pending Final Administrative Action.

Appellee seeks to have this Court apply here the customary rule which gives jurisdiction to the federal and state courts to determine controversies *between private citizens* as to their respective rights of possession of patented and unpatented public domain. In such cases, the parties may therein offer evidence and be heard upon, and may secure a decision upon, the issue of right of possession.

The *Archer* case, cited on page 6 of Appellee's Brief, did not involve an entry on the public domain; it involved the private lands of the petitioner and a trespass and conversion by the other party. The decision in *Erhardt v. Boaro*, 113 U.S. 537 (1885), also cited by Appellee, is another example of the rule between private litigants, but is not applicable here.

The same comments apply to the *Gauthier*, *Perego*, *Bowen* and *Northern Pacific Railway Co.* cases, also cited by Appellee on page 6 of its Brief.

Appellee generally states in its Brief (p. 7), that "the United States as a property owner is in no worse position than any other property owner", citing *United States v. Schultz*, 31 F. 2d 764 (N.D. Cal., 1929), and *Kennedy v. United States*, 119 F. 2d 564 (C.A. 9, 1941).

The *Schultz* case, a 1929 decision in the trial court held, 34 years before the *Best* decision, that the United

States could *elect* whether to proceed in the courts or the Interior Department when it initiated its proceedings to vindicate its rights in public lands. Here it *elected* to proceed in the land office. It certainly may not badger claimants with a multiplicity of proceedings, and proceed in both courts and land office.

The *Kennedy* case of 1941 came 22 years before the *Best* decision. It recognized, quoting the *Schultz* opinion, that the United States could elect to seek judicial or administrative relief. In *Kennedy*, it sought judicial relief.

Here it elected to seek agency relief in 1964, possibly following the *Best* decision of 1963. Herein is the distinction—the agency has complete jurisdiction of the question of the validity of the mining claim, and therefore of the right to possession. The courts, under the authorities here applicable, such as *Best* and others cited in our Opening Brief, have none until a final decision is entered.

The true rule is set out in the many cases cited in Appellants' Opening Brief, with which Appellee has taken no exception.

Before moving to the next point in Appellee's Brief, we point out that Appellee has misinterpreted the opinion of the Supreme Court in *Best*. There were *two* court cases involved in the *Best* controversy—a civil suit first filed by the United States in eminent domain, in which, at the outset, the government secured an order for immediate possession, and a second suit (which eventually reached the Supreme Court) filed by the claimant

to enjoin prosecution of an administrative contest against the mining claims there involved and which contest had been filed in the land office after the first suit was instituted. The claimant sought to have the Court in the eminent domain case determine the validity of the involved claims. It appears from the decision of the District Judge in the second suit for an injunction (*Humboldt Placer Mining Company v. Best*, D.C., N.D., Calif., N.D., 1960, 185 F. Supp. 290), and of this Court on appeal in that case (293 F. 2d 553), that the District Judge in the eminent domain case had held the latter case in abeyance pending a final decision in the administrative contest. The District Judge in the second (injunction) case refused to enjoin the contest proceedings and dismissed the second suit upon the apparent belief that both the Court in the eminent domain case *and* the Department had jurisdiction to determine validity. This Court held that the first suit was the act of the Secretary first invoking a determination by the courts, and the election left him without retained jurisdiction to determine the issue in the Department. The Supreme Court, on appeal in the *injunction* case, held that the Court in the eminent domain case had properly held that case in abeyance, and that the issue of validity belonged in the Department even though the contest had not been filed until after the suit to condemn had been brought. The condemnation suit was filed to acquire title, with the customary incidental order for immediate possession. *Best* is not authority for the proposition advanced by Appellee. It runs to the contrary.

II.

**The Secretary Can Make Any Agency Decision
Final and Ripe for Judicial Enforcement at Any
Time.**

At page 8 of Appellee's Brief the bare statement is made that the "oft-cited plenary powers of the (Interior) Department pertain only to the validity question", and the argument is made that the government is powerless to protect the public interest unless it has recourse to courts. No authority is cited. The point of urgency is curiously raised in this case, where the claim has been operated since 1953, not even contested until 1964.

The Secretary of the Interior, at *any time*, may exercise the powers given him by Congress and make or make final an administrative decision relating to the validity of a mining claim on the public domain, thus immediately affording the interested agency or the Secretary the right to seek judicial relief. (5 *U.S.C.* sec. 557, formerly sec. 1007; *Susquehanna-Western, Inc.*, A-30714, dec. 8/18/67; *Public Service Co. of New Mexico*, 71 I.D. 427 (1964).) A bare trespass or conversion can be controlled by appropriate action under the criminal statutes, as, it would seem, a fraudulent misuse of the public land laws could be controlled. The administrative practice followed by the Secretary in joining in a Bureau of Land Management decision, so the matter thus made final will be ripe for immediate consideration by the courts, is well known and often used.

III.

The Action Should Be Dismissed.

Decisions of both a hearing examiner and of the Director of the Bureau of Land Management are not binding on the Secretary, who holds that findings of fact by these officers are not binding on him. (*United States v. Middleswart*, et al., 67 I.D. 232 (1960).)

The Secretary even holds himself not bound by formal stipulations made by representatives of the United States in contest proceedings and hearings. (*Stanislaus Elec. Power Co.*, 41 L.D. 655 (1912).)

Where, then, can there be *any* effective or legally recognized decision of invalidity prior to a *final* decision under the Secretary's own regulations and the Administrative Procedure Act? (5 U.S.C. sec. 537). With stipulations, findings of fact, and the very decision itself not binding on either the Director of the Bureau of Land Management or the Secretary, who asserts and exercises total freedom to ignore, disavow, or adopt them, such an initial, ineffective decision cannot become the foundation for a judicial action to enforce it. The very pendency of the contest proceeding foreclosed appellees from any attempt to show in the judicial enforcement proceeding (this case) that they really had a valid mining claim. Use of the examiner's decision as a foundation for a cause of action is here sought to be made under circumstances in which it cannot be questioned or reviewed.

Due process requires that validity be determined in only *one* proceeding, namely, the Interior Department

proceeding, and that it is only a *final* agency determination, one ripe for judicial review, that may be the basis of a judicial action to enforce it through injunction, ejectment and assessment and collection of damages.

And, pending entry of that *final* and *reviewable* agency action (which may be substantially expedited by the Secretary under appropriate *or any* circumstances, as noted above), the mining claimant, prevented from proving to a court the validity of his claim, should not be deprived of due process by being subjected to a civil action for injunctive relief and damages or to the restraint of an injunctive order issued *pendente lite* in such an action.

The *Light, Debs*, and *Petersen* cases, cited on page 9 of Appellee's Brief, are not in point, for they involved trespassers who made no attempt to comply with public land laws and regulations governing entries thereon, and who usurped public property or the use thereof.

Conclusion.

For the foregoing reasons, and those set out in Appellants' Opening Brief, this Court should reverse the Order appealed from, and direct dismissal of the action.

Respectfully submitted,

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July 17, 1968.

No. 22691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

FILED

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No. 22691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal from an interlocutory Order of the District Court for the Central District of California. The Order (1) enjoined Appellants from mining upon an unpatented mining claim located in 1953; and, (2) denied Appellants' motion for summary judgment of dismissal made upon the ground that the Court had no jurisdiction.

The Order from which the appeal was taken [C.T. 310] was entered December 7, 1967, pursuant to a preliminary determination filed October 19, 1967 [C.T. 264]. There was no opinion.

Jurisdiction.

The Order entered December 7, 1967, granted Appellee's motion for a conditional preliminary restraining order restricting and limiting the mining operations of the claim owners, their lessees and sublessees, all of whom are the Appellants. The action was filed and

the injunctive order was made while administrative contest proceedings filed by Appellee against the claim owners (who are two of Appellants) were pending in the Department of the Interior. The administrative contest is still pending on appeal to the Director of the Bureau of Land Management within the Department of the Interior.

The Complaint in this action [C.T. 2] sought preliminary and permanent injunctions to prevent Appellants from operating the claim as an unpatented mining claim by mining, processing and removing the mineral material (sand and gravel) from the claim; an accounting for materials mined and removed from the time of location on July 25, 1953, to the filing of the action, the money values of the sales of material already mined and sold and the amounts of the sales, plus money damages to Appellee, the same to be dependent upon the amounts and values shown by the accounting; also damages, costs and general relief. The conditional order has had the effect of interrupting and suspending mining operations on the claim.

Jurisdiction of the District Court was invoked under 28 U.S.C. sec. 1345 [C.T. 2]. Appellants disputed the jurisdiction of the District Court, by their Answer, their written opposition to the government's motions for preliminary injunction, and their Motion for Summary Judgment of Dismissal for Lack of Jurisdiction [C.T. 227-228], because of the pendency of the administrative contest proceedings [C.T. 57-58, 61-62, 109, 113, 205, 207, and R.T. 19]. They continue to dispute it.

Jurisdiction of this Court is invoked and rests upon 28 U.S.C. sec. 1292. Notice of Appeal was filed January 8, 1968 [C.T. 314].

Statement of the Case.

There has been no suggestion of any wrongful use by Appellants of the surface of the claim for purposes other than mining nor of fraud or bad faith. The Complaint in this action [C.T. 2] is founded upon the government's claim of ownership of the land in the claims and the invalidity of the mining location (Para. IV of the First Cause of Action, repleaded in each of the two other causes of action [C.T. 42]). Appellee's sole ground advanced for the preliminary injunctive relief has been (1) that the claim had been declared void by a hearing examiner's decision in the land office; (2) that the claim is void for several reasons not involved on the pending administrative appeal to the director [C.T. 4, lines 11-14] although raised in the original contest complaint [C.T. 21], and (3) that the United States is the owner of the ground. The contest charged lack of discovery of a valuable mineral, the classification of the mineral as a common variety, and general non-mineral character of the land [C.T. 21]. The examiner merely held the claim void for lack of a *timely* discovery of a valuable mineral deposit. The civil complaint allegations attempt to revive the issues of lack of discovery and of the non-mineral character of the land [C.T. 4].

Appellee, on filing the suit, moved the District Court on notice [C.T. 12] for a preliminary restraining order. Extensive affidavits were filed by both sides and after a hearing, the motion was denied [C.T. 162], the Findings of Fact, Conclusions of Law and Order reciting the conclusion of the Court that the validity of the claim was being determined in administrative contest proceedings in the Bureau of Land Management, and that

until the administrative proceedings had been completed it would be inequitable to grant the injunctive relief [C.T. 162].

Appellee thereupon again moved the Court, this time for a conditional restraining order [C.T. 169]. Appellants opposed by affidavits and written [C.T. 204] and oral [R.T. 19] argument, and also moved for a summary judgment of dismissal of the action [C.T. 227] for lack of jurisdiction, which later they pressed by oral argument as well [R.T. 19].

The Court denied Appellants' motion and granted the conditional restraining order appealed from. The order restricted the owners and operators to mining and removing only that material on the claim which would be seasonably replenished by natural means [C.T. 310].

The claim was located in 1953, almost 2 years to the day before the "common varieties" law was enacted. It is situated in the delta created by the flow of the waters of Grout Creek, near the point at which they reach Big Bear Lake, in San Bernardino County, California [C.T. 74, 93 and 168]. It was owned and operated for its valuable mineral deposits of sand and gravel which, when washed in a commercial aggregates plant, meet portland cement concrete aggregates specifications of the U. S. Forest Service and of the Division of Highways of the State of California, the material being equal or superior to other aggregates materials found in the area. It has been used unwashed in the area for all concrete purposes except school construction [C.T. 26, 70 and 77]. There is a large commercial sand and gravel mining and processing plant on the claim along with the necessary sand and gravel pits created by mining [C.T. 38 and 41]. The plant

has been in its present extensive form since 1960 [C.T. 82]. An application for patent has not been filed. Much of the area in the vicinity of the claim is patented ground, as to which the Forest Service cannot control use [C.T. 77 and 94]. Some of the private ownerships in the area are in commercial and business use [C.T. 73]. Big Bear Lake itself is privately owned [C.T. 10].

The government initiated the administrative contest against the owners of the claim March 18, 1964, through the filing of a contest complaint in the Riverside Land Office of the Bureau of Land Management of the Department of the Interior, asserting that there had been no discovery of a valuable mineral deposit prior to July 23, 1955 (the effective date of the so-called Multiple Use Act, 30 U.S.C. 601 *et seq.*), that the involved mineral was a "common variety" within the meaning of the act, and that the land was non-mineral in character [C.T. 21]. The contest was filed almost 11 years after location of the claim in 1953. Contrary to the requirements of the regulations (43 C.F.R. 1852.2-2 and 1852.1-4(a)(1)), all interested parties were not named as contestees. The lessees and sublessees (some of Appellants herein) were ignored and not made contestees. The named contestees filed a timely answer to the contest and the issues raised were heard by a hearing examiner of the Bureau of Land Management November 8, 1965. Following submission, the examiner made detailed findings of fact by his decision dated March 14, 1966, to the effect, in part [C.T. 26, 27, 28, 29 and 77], that in the period from the location of the claim up until July 23, 1955, when the common varieties amendment became effective, Mr. Barrows operated the claim and was known to other

persons in the area who were engaged in the sand and gravel business, as one who was in that business; the Barrows operations, while small, showed a profit found by the examiner as ranging from \$3.50 to \$4.60 per cubic yard of the sand and gravel material sold, with costs of digging, loading, and delivery varying from \$0.40 to \$1.50 per yard, including the services of Mr. Barrows at \$1.50 per hour and depending on the point of delivery; in each of the two years in question prior to July 23, 1955, some sand and gravel on the claim was extracted, removed, and marketed by Mr. Barrows at a substantial profit of from \$2.50 to \$4.60 per yard, and some was sold by him at the claim for \$0.75 per yard; in the period, at least 600 yards of sand and gravel were removed from the claim and sold.

Basing his consideration of the facts found by him upon a then current concept of the "marketability" rule of the Department, rather than the rule recently approved by the Supreme Court in *Coleman*, the examiner determined that the claim was null and void for lack of what he termed a "timely" discovery prior to July 23, 1955, of a valuable sand and gravel mineral deposit under the general mining laws. The examiner stated in his decision that it was agreed by the parties that the material was a common variety and hence not locatable after July 23, 1955. (The contestees deny making this concession and this will be resolved in the agency appeal.) He thus concluded [C.T. 26], contrary to the contention of the contestees, that there had been a failure by the locators to discover a valuable deposit of sand and gravel within the claim between the date of the location in 1953 and the effective date of the common varieties amendment of July 23, 1955, and that the material for which the claim was located by Bar-

rows and which was mined by him and has been mined in the commercial mining operations engaged in thereafter on the claim, was a common variety of sand and gravel within the meaning of Sec. 3 of the act of July 23, 1955 (30 U.S.C. sec. 611) and therefore not subject to consideration as a valuable mineral discovery so as to validate the claim after July 23, 1955.

The contestees took a timely appeal to the Director of the Bureau of Land Management under applicable administrative regulations [C.T. 70-71], and that appeal is pending, undecided. It had the effect of suspending the effect of the decision pending the appeal (43 C.F.R. 1840.0-9(a)). This action was filed June 8, 1967, while the administrative contest was pending on such appeal. The United States has not dismissed the contest and it remains undecided on the appeal.

The intent of the injunctive order having been to restrict and limit the mining claimants and those in active possession under them from mining and removing sand and gravel in excess of such as is "normally replenished seasonally" by the forces of nature within the claim, Appellants are materially prejudiced. Since the making of the original conditional order, the District Judge has amended the form of his Order to prohibit mining and removal of material below a certain line, established under his order to define the contour of the sand pit as of a date in December, 1967. Mining was necessarily stopped by the effect of the Order in February, 1968, because of the absence of a flow of water in Grout Creek sufficient in force and volume to bring replenishing material on to the claim area. The Order of December 7, 1967, has had the effect of en-

joining defendants, pending trial or the further Order of the Court, from using the mining claim as a mining claim under the mining laws of the United States.

This appeal followed.

Questions Involved.

1. Whether the District Court has jurisdiction of this action for an injunction and damages while the validity of the unpatented mining claim, the use of which is sought to be enjoined upon the ground of invalidity, is in the process of being determined in an administrative mining claim contest proceeding first filed by Appellee and which proceedings are still pending upon an administrative appeal by the contestees from a hearing examiner's decision that is expressly made ineffective by the applicable administrative regulations.

Appellants raised the question repeatedly in opposing both motions for preliminary and temporary injunctions [C.T. 109, 113-114, 204 and 207 and R.T. 19], and by moving for dismissal for lack of jurisdiction [C.T. 227-228]. Their Answer also raised the issue [C.T. 57-58, 61-62].

2. Whether the District Court under the facts presented in this action could properly enjoin or restrict *pendente lite* the full possession, enjoyment and use of the claim for mining purposes by the claim owners and their lessees and sublessees, under the general mining laws, until such time as a final administrative determination of invalidity in the pending contest appeal proceedings.

Appellants raised this question by the same means set out under 1, above, the record references being the same.

3. Whether it was inequitable and a deprivation of due process of law to Appellants to exercise jurisdiction in the action to consider requests for injunctive relief or to make an order restraining use of the claim as a mining claim at a time when the question of validity of the claim could not be examined into or determined in the civil case because the issue had been first submitted by Appellee for administrative determination and had not been effectively or finally decided in the administrative proceeding.

The question was raised by the opposition disclosed by the record references given under 1, above, and the absence of due process was pointed out in writing [C.T. 116 and R.T. 39].

4. Whether in any event the *status quo* sought to be maintained by the District Court in such case can mean something other than full possession, enjoyment and use as a mining claim under the general mining laws, including mining and removal in good faith of mineral material from the claim, as engaged in upon the claim in the general period of time just prior to the filing of the action.

Specification of Errors Relied Upon.

1. The District Court erred in exercising jurisdiction in the case at all and in failing to dismiss the action upon the motion of Appellants or to stay it for all purposes.

2. The District Court erred in granting the government's motion for an order restraining and limiting full possession, enjoyment and use of the unpatented mining claim during the pendency of the administrative min-

ing claim contest proceeding which was initiated by the government prior to filing this action.

3. The District Court, if it could properly maintain *status quo* pending final administrative determination of its validity, nevertheless erred in that *status quo* here was the unrestricted operation in good faith of the unpatented mining claim under the mining laws of the United States without limitation on the amount of material removed or replenished in a given or any season or year.

Summary of Argument.

The civil action seeks to limit and curtail a right acquired and held under the general mining laws. That right was property in the fullest sense of the word. Due process of law required, as a minimum for its suspension or termination, that notice be given and an opportunity be afforded for a hearing on the issues involved. A hearing necessarily involves an effective determination by decision.

While the government gave the owners of the record title to the claim notice of the contest and an opportunity to be heard on the issue of validity of the claim, nevertheless under the governing regulations, the preliminary decision of invalidity by the hearing examiner has not become effective and has been suspended from effectiveness during the pendency of the administrative appeal.

The appealing contestees, by the very fact of their administrative appeal, show that they do not agree with

the examiner's decision. Just how the facts found by the examiner will be treated under the recent *Coleman* decision is not known. It is reasonable to assume that the Barrows contest case will be subjected to further administrative consideration and decision, and probably a further appeal can be expected. In any event, the issue remains in the agency's hands, under its regulations. That forum was selected by Appellee, when it filed the contest complaint under Departmental regulations.

The government, by filing the action, ignored the primary jurisdiction of the agency and the "stay of hands" rule of *Best v. Humboldt Placer Mining Company*, 371 U.S. 338 (1963), and also sought to again litigate in the court issues which had been raised by it in the contest complaint before the agency.

Until the administrative agency made its final determination, and in the absence of fraudulent misuse of the mining laws, the filing and maintenance of the civil action forced Appellants who are contestees into two separate forums at the same time, a condition not supported by the stay of hands rule, the rules of primary jurisdiction nor the concept of due process of law. The pendency of the contest appeal forced Appellants to stand mute on the subject of the validity of the claim, against the government's motions for injunctive orders. They could not litigate in the court what should have been the basic issue created by the government's motions for restraining orders—the validity of

the claim. Title was not involved. Right to possession was involved. Proof of its right to possession, in the civil case, was foreclosed merely because of the assertion by the government of the invalidity of the claim.

The obvious lack of due process of law in such a procedure forces the conclusion that, absent fraudulent misuse of the mining laws, the government should stay out of the courts until the administrative proceedings, if adverse to the claimant, have become final. Under the pertinent appeals regulation of the Department, any such administrative decision can be made immediately effective if called for by the facts, thus affording opportunity to the government officers to seek help from the courts and equal opportunity to the contestee to seek judicial review and an order staying enforcement, if called for.

Those of Appellants who were lessees and sub-lease operators of the claim and not owners, were not named or brought into the contest proceedings, although they certainly were interested parties, and the lack of due process is even more apparent. They could not argue the issue of validity in the court—and they had not had notice or an opportunity to be heard in the agency proceedings.

Finally—because of the so-called marketability rule, relating to discovery of a valuable mineral deposit under the general mining laws—use of the injunctive power of the court in a case such as this operates to forfeit the market of the miner or to deprive him of it, and of

his opportunity to share or compete in it, by shutting down his operation *long before* there is or may be a final determination of the invalidity *or validity* of his claim. (Invalidity need not be a foregone conclusion!) While the answer to the question of validity sought in the agency is not final and thus remains ineffective through the years in which the matter works its way through the decisional processes, a judicial injunctive order such as here issued *pendente lite* and having the effect of suspending mining and sales of mineral from the claim, or of ending them because of consequent economic pressures and therefore loss of market or position in the market, creates great injustice and inequity and a result hardly compatible with due process and equal protection under the law. And, we add, hardly compatible with the intent of the mining law or of the stay of hands rule.

ARGUMENT.

I.

Pendency of the Prior Administrative Contest Proceeding Required at the Very Least That the District Court Should Stay Its Hand and Take No Action Until a Final and Effective Administrative Decision Declared the Claim Void.

The question of the validity of an unpatented mining claim is one the resolution of which is within the exclusive primary jurisdiction of the Secretary of the Interior and not the courts.

The Supreme Court has directly held in *Best v. Humboldt Placer Mining Company*, 371 U.S. 334 (1963), 9 L. Ed. 2d 350, that if a patent has not issued, controversies over a mining claim should be solved by appeal to the Department of the Interior and do not belong in the courts. At page 338 (371 U.S.) the Court said:

“If a patent has not issued, controversies over the claims ‘should be solved by appeal to the land department and not to the courts.’ *Brown v. Hitchcock*, 173 US 473, 477, 43 L ed 772, 774, 19 S Ct 485. And see *Northern P.R. Co. v. McComas*, 250 US 387, 392, 63 L ed 1049, 1053, 39 S Ct. 546.”

In *Brown v. Hitchcock*, 173 U.S. 473 (1899), the Supreme Court clearly held that the responsibility of the administrative agency to determine matters of title to public lands, so long as patent has not issued, belongs to the agency and should be solved by appeal to it and not to the courts, and said (p. 477):

“— As a general rule no mere matter or administration in the various executive departments of the government can, pending such administra-

tion, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.—”

This primary jurisdiction of the agency required the government to first seek relief by filing an administrative contest under the provisions of Sub-part 1852 of 43 C.F.R. (Contest and Patent Proceedings). This it proceeded to do; but, that administrative remedy had not been exhausted when the suit was filed. In truth, the essential element of a decision is lacking, for the examiner's action was not effective during the time an appeal could be taken, and its effectiveness was automatically suspended by the taking of the administrative appeal. The regulation (43 C.F.R. 1840.0-9(a)), applicable to contests and appeals in the agency, provides in pertinent part:

“(a) Normally a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the officer to whom an appeal may be or is taken may provide that a decision or any part of it shall be in full force and effect immediately.”

It matters not that the unusual lengths of time consumed in administrative appeals dictate a need for a rule other than sought here by Appellants, for it is clear that the regulation always permits an administrative contest

decision in the agency to be declared and made immediately effective, as provided in 43 C.F.R. 1840.0-9(a) and (d), thus giving the party adversely affected a right to an early judicial review and giving the appropriate agency the opportunity to seek immediate injunctive and other relief in the courts.

II.

The District Court Had No Jurisdiction to Act in the Case at All and It Should Have Dismissed It.

If the courts should “stay their hands” pending completion of administrative proceedings, no good reason appears for them to retain such an action as here involved, at all. The action should have been dismissed for lack of jurisdiction at this time, in advance of a final and effective agency decision.

In *Far East Conference v. United States*, 342 U.S. 570 (1951), 96 L. Ed. 576, the Supreme Court had to decide whether a District Court could pass on the merits of the complaint, before the Maritime Board had passed on the question involved. It concluded that the Board had primary jurisdiction, and that the civil complaint should be dismissed. It said (at p. 574):

“The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a

premise for legal consequences to be judicially defined. Uniformly and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.”

And at page 577 it concluded:

“An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari. Pub. L. No. 901, 81st Cong 2d Sess sec. 2, 10, 64 Stat 1129, 1132. If the Board’s order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General’s application. 39 Stat 728, 737, 46 USC sec. 828. We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government’s complaint should now be dismissed, as was the complaint in *United States Navigation Co. v. Cunard S.S. Co.*, 284 US 474, 76 L ed 408, 52 S Ct 274, *supra*.”

In *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 US. 752, 91 L. Ed. 1796, the Supreme Court pointed

out some of the reasons for the primary jurisdiction rule, and said (at p. 767):

“The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.”

The question of the validity of the location having been assigned to the Secretary of the Interior, the District Court did not have jurisdiction to decide that issue or anticipate the Secretary's final decision, and should have dismissed the complaint. As said in *Macauley v. Waterman Steamship Corporation*, 327 U.S. 540, 544 (1945), 90 L. Ed. 839, 842:

“In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the Myers Case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.”

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1937), 82 L. Ed. 638, 644, the Supreme Court pointed out that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

See also: 2 Am. Jur. 2d (Administrative Law), pages 700-701, sec. 796, where some of the authorities are listed.

III.

This Court May Properly Review the Order Denying the Motion to Dismiss for Lack of Jurisdiction.

While generally this Court may not consider the propriety of an order denying a motion to dismiss upon an interlocutory appeal, it may do so in this case.

Jurisdiction of the action was essential before the District Court could enjoin. In *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940), 85 L. Ed. 189, 193, the Supreme Court said, after ruling that an appeal from an interlocutory order for an injunction was proper:

“However, this power is not limited to mere consideration of, and action upon, the order appealed from. ‘If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.’ *Meccano v. John Wanamaker*, 253 US 136, 141, 64 L ed 822, 826, 40 S Ct 463. See also *Eagle Glass & Mfg. Co. v. Rowe*, 245 U.S. 275, 63 L ed 286, 38 S Ct. 80; *Metropolitan Water Co. v. Kaw Valley Drainage Dist.* 223 US 519, 56 L ed 533, 32 S Ct 246; *Mast, F. & Co. v. Stover Mfg. Co.* 177 US 485, 44 L ed 856, 20 S Ct. 708; *Smith v. Vulcan Iron Works*, 165 US 518, 41 L ed 810, 17 S Ct. 407. Accordingly, the Circuit Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision. *Reed v. Lehman* (CCA 2d) 91 F(2d) 919;

Miller v. Pyrites Co. (CCA 4th) 71 F(2d) 804.
Compare Gillespie v. Schram (CCA 6th) 108 F
(2d) 39; Rodriguez v. Aresemena (CCA 5th)
91 F(2d) 219; Kneberg v. H. L. Green Co.
(CCA 7th) 89 F(2d) 100; Satterlee v. Harris
(CCA 10th) 60 F(2d) 490."

In *Eighth Regional War Labor Board et al. v. Humble Oil & Refining Co.* (CCA-5), 145 F. 2d 462, 464, cert. den. 325 U.S. 883, 89 L. Ed. 1998, the court said:

"It first contends that, since the appeal is from an order granting a temporary injunction, and the merits of the case have not been decided, the only issue before the court is whether the lower court abused its discretion in granting the preliminary injunction. It is true that the nature of the appeal precludes a decision on the merits here, but the question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion. The question whether a court has abused its discretion necessarily involves the question whether a court has any discretion to abuse."

See also

Meccano v. John Wanamaker, 253 U.S. 136, 141, 64 L. Ed. 822, 826;

Deckert v. Independence Shares Corp., 311 U.S. 282, 287, 85 L. Ed. 189, 193;

Jones v. Brush (9 Cir.), 143 F. 2d 733, 734.

IV.

A Valid Mining Claim Is a Possessory Right, Good as Though Secured by Patent Against the Sovereign as Well as Third Persons.

A claim location segregates the selected land from the public domain and confers the right of exclusive possession upon the locator. As said in *Wilbur v. United States, ex rel. Krushnic*, 280 U.S. 306, 316-317 (1930), 74 L. Ed. 445:

"The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property', subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk v. Meagher*, 104 U.S. 279, 283, 26 L. ed. 735, 737, 1 Mor. Min. Rep. 510; *Manuel v. Wulff*, 152 U.S. 505, 510, 511, 38 L. ed. 532-534, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85; *Elder v. Wood*, 208 U.S. 226, 232, 52 L. ed. 464, 466, 28 Sup. Ct. Rep. 263; *Bradford v. Morrison*, 212 U.S. 389, 53 L. Ed. 564, 29 Sup. Ct. Rep. 349. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

See also: *Cole v. Ralph*, 252 U.S. 286, 295 (1920), 54 L. Ed. 567.

When the invalidity of a mining claim depends upon resolution of a factual issue, such as lack of discovery, the claim can be declared invalid in administration pro-

ceedings only after notice and a hearing, and until such hearing is held or an opportunity afforded for a hearing, and the claim determined to be invalid, there is a deprivation of due process if the claimant is dispossessed.

Adams v. Witmer, 271 F. 2d 29 (1959);

United States v. O'Leary, 63 I.D. 341, 344 (1956).

The injunctive order appealed from seeks to do exactly this—to restrict or end possession and enjoyment merely because of the pendency of the administrative contest proceedings and the existence of the examiner's decision which has not yet been made effective by the Secretary.

This Court, in *Adams v. Witmer*, 271 F. 2d 29 (1959), clearly held that the right of exclusive possession and enjoyment of an unpatented mining claim which had been the object of an administrative contest complaint and had been declared invalid by the Secretary of the Interior after successive appeals in the administrative proceedings, would still be protected by the courts when a timely civil action had been filed to secure a judicial review of the administrative decision. In *Adams*, following the final administrative action, the appellee Berriman, the District Forest Ranger, demanded possession of the claims and orders appellant claim owner to remove his structures and buildings therefrom (somewhat as the appellee seeks to do by judicial proceedings in the case at bar at a time prior to the final administrative decision). The mine claimant in *Adams* asked the District Court to give him temporary injunctive relief against the government representative, Berriman, but the District Court dismissed the case because it felt the claim owner was not entitled to any relief

(apparently for failure to name the Secretary of the Interior as a defendant). After noting (p. 35) that the immediate relief sought by the claimant was the restraint of Berriman, and that the claimant's continued possession and right to work the claims was not dependent upon a patent being issued, this Court concluded the Secretary was not an indispensable party, and that one of the administrative irregularities of which the claimant complained had been waived by him and yet others were still subject to review. On petition for rehearing, the Court held directly that the District Court had jurisdiction to restrain Berriman, saying (at p. 38):

“But that does not affect the action, as it concerns Berriman, who, after all, is the person who is alleged to threaten appellant's possession. It is that possession appellant seeks to protect and vindicate. Our opinion noted that ‘appellant's continued possession of and right to work the mining claims is not dependent upon a patent being issued.’ An injunction against Berriman ‘will effectively grant the relief desired by expending itself on the subordinate official who is before the court’, as we note in our opinion. We perceive no reason why the abatement of the case as against Witmer should affect its continued prosecution against Berriman.”

Mining locations and therefore mines are permitted in national forests, and this is recognized in public land law and regulations. Section 1 of the act of June 4, 1897, 30 Stat. 36, found in 16 U.S.C. sec. 478, provides in pertinent part:

“ . . . Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of pros-

pecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations.”

Title 43 C.F.R., para. 3400.1 provides in pertinent part:

“(a) Vacant public surveyed or unsurveyed lands are open to prospecting, and upon discovery of mineral, to location and purchase. The act of June 4, 1897 (30 Stat. 36), provides that ‘any mineral lands in any forest reservation which have or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry,’ notwithstanding the reservation. This makes mineral lands in the forest reserves in the public land states, subject to location and entry under the general mining laws in the usual manner. . . .”

The issue is a sharp one—and in the absence of fraudulent misuse of the mining laws, there should be no right on the part of the government to take the matter into court and there secure an order suspending good faith mining use of the claim in proceedings in which the court cannot inquire into the validity of the claim, and when the issue of validity is still not finally settled in the department—where, it can be hoped, the issue may yet be determined favorably to the appealing contestees.

V.

**A Preliminary Injunction Should Not Have Been
Granted in Any Event, and the Order Was an
Abused Discretion.**

The purpose or function of a preliminary injunction is to preserve the *status quo* pending final determination of the action after trial and a full hearing.

Miami Beach Fed. S. & L. Assn. v. Callander,
5 Cir., 256 F. 2d 410, 415;

Tanner Motor Livery, Ltd. v. Avis, Inc., 9
Cir., 1963, 316 F. 2d 804, 808.

Status quo is the last uncontested status which preceded the pending controversy.

Tanner Motor Livery, Ltd. v. Avis, Inc., 9 Cir.,
1963, 316 F. 2d 804, 809.

Conclusion.

Pendency of the issue of validity, undecided, in the agency having primary jurisdiction required that the judicial processes be withheld until the issue has been finally resolved in the agency. As said in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956), 1 L. Ed. 2d 126,

“‘Primary jurisdiction,’ on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administra-

tive body for its views. General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433, 84 L ed 361, 370, 60 S Ct 325.”

Suspension of the judicial process required dismissal, or, as a minimum, a refusal to enjoin and an abatement.

Respectfully submitted,

JOHN B. LONERGAN and
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Attorneys for Appellants.

May 28, 1968.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN B. LONERGAN

No. 22691.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEB 24 1969

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court
for the Central District of California.

PETITION FOR REHEARING

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FILED

MAR 10 1969

U.S. COURT OF APPEALS
NINTH CIRCUIT

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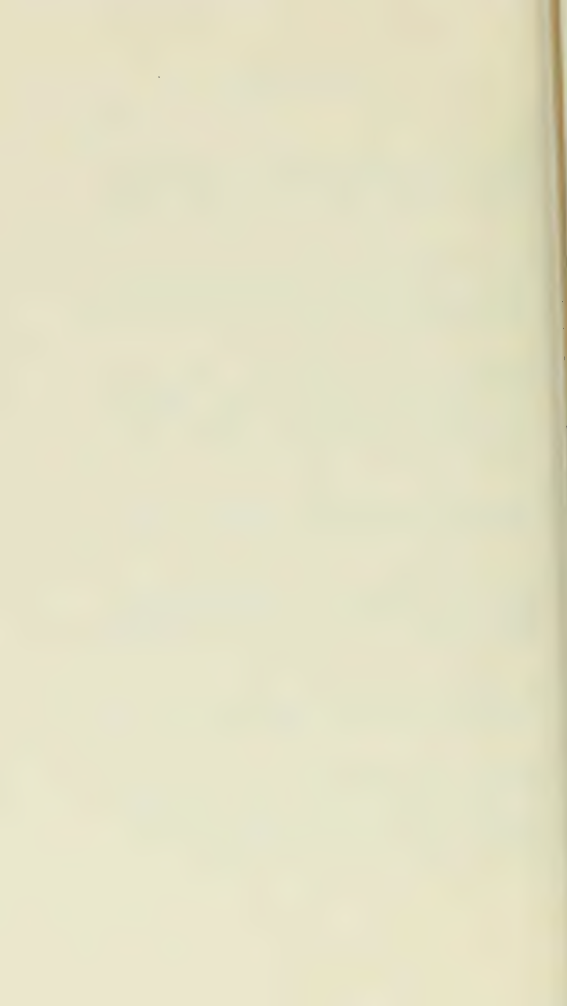
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PETITION FOR REHEARING

Appellants present their Petition for Rehearing and
in support thereof respectfully show:

I

The decision as written involves an important question affecting the entire mining industry in the public land states

The decision, if permitted to stand, can have a disastrous effect upon the bona fide mining industry engaged in actually mining on unpatented mining claims located on the public domain. It applies to claims located for any locatable mineral-intrinsically valuable or otherwise, metallic or non-metallic. It would apply without regard to the good faith of the claimant.

It upholds the right of the United States to use judicial proceedings to wholly suspend bona fide actual mining and removal of mineral substances from within any unpatented mining claim in advance of a final administrative decision invalidating the claim and under procedural circumstances in which the mining claimant can have no right or opportunity to show the validity or probable validity of his claim in the judicial proceeding simply because the issue is pending for decision in an earlier filed administrative government mining claim contest in the Department of the Interior.

If the decision stands, the United States need only file a government contest against a claim in the land office and then, without the matter having proceeded to a final administrative decision of invalidity, or, in fact, without proceeding beyond the mere filing of the contest, the United States may seek and obtain an injunctive order, thereby suspending the actual mining operations or preventing the use of a reserve while the administrative proceedings move ponderously toward their final conclusion.

II

The effect of the decision is to deprive the claimant of an opportunity to be heard and violates principles of due process of law

A. A government contest complaint having been filed in the land office, that agency has exclusive jurisdiction of the subject of the validity of the claim. Under the decision, a subsequent application to a district court for injunctive relief pending the final administrative determination is made and must be acted upon in a vacuum in which the claimant can not be heard until

there has been rendered against him a final and effective decision in the land office. He is thus unable to present evidence of or to argue validity in the courts in opposition to the government's application for the injunction. This can not be due process of law.

B. The decision made no mention of the constitutional point although it was raised in written and oral argument by Appellants (App. Op. Br. pp. 11, 12 and 13; App. Cl. Br. pp. 7 and 8).

III

Application of the rule of the decision in the light of the marketability concept of valuable discovery will result in unreasonable and unlawful loss of property rights

A. The decision states that defendants argued orally but not in their briefs that the current marketability requirements of a valuable discovery would result in the loss of their claim when such an injunction is obtained. This overlooked the argument on pages 12 and 13 of Appellants' Opening Brief. There it was pointed out that the use of the injunctive power in such a case operates to forfeit the market of the miner.

B. The decision then goes on to state that a government-sought temporary injunction may not be permitted to prejudice a claimant's asserted rights in such a way. But this is of no comfort to a claimant who is actually forced out of a market or prevented from entering in or is adversely affected financially and thus is unable under the marketability rule to show a valuable discovery at the time his title and right are challenged by the government at the hearing in the land office.

C. The decision on this point completely overlooks the application of the marketability concept of a valuable discovery to support a mining claim to all claims and in every instance whether in opposition to a government contest or in opposition to a conflicting junior locator. The latter may freely enter, not being subject to the injunction and perhaps not even knowing of it, and can locate a conflicting claim and can readily show in successful private litigation with the contestee that the contestee had no "marketability" (no valuable discovery) was in fact not operating, and had either lost his market or was out of it at the time of the later location. The "property right" of the first claimant would thus be a myth, reduced to that by the injunctive relief granted the government.

D. The land office itself determines validity as of the time of its hearing on such contests, and a marketability developed during agency appeals will be considered cause for a setting aside of a preliminary and ineffective examiner's or other agency decision so that evidence of the qualification can be put in the record. This administrative construction should not be overlooked.

IV

The decision ignores the right granted by the general mining law in 30 U.S.C. 22

A. The statute (30 U.S.C. 22) make all valuable mineral deposits in lands belonging to the United States free and open to exploration and purchase and the lands in which they are found to occupation and purchase

by citizens. This is the statute that authorizes the location of mining claims in the manner provided by subsequent provisions of the general mining law.

B. The marketability concept of valuable discovery requires a show of profitability, a status to be achieved in most cases only in something considerably more than a moment or a day.

C. Attainment of marketability can be stopped by the government by the application of the rule of the decision, before the claimant has had an opportunity to "make the grade" and attain a condition of profitable marketability for the mineral. This seems to be clearly contrary to the intent of the general mining law.

V

The decision misinterprets the cited Northern Pacific Ry. Co. v. McComas and Kennedy v. United States decisions

The *McComas* case simply held that in litigation between private parties, relating to possessory rights in public land, where the matter of the disposal of the title was pending in the land office, the court nevertheless have jurisdiction to protect a possession lawfully acquired or to restore one wrongfully interrupted. The government was not a party to the *McComas* case and the controversy was between private conflicting claimants.

Kennedy held that when the government elected to proceed in the courts rather than for administrative relief, there was jurisdiction in the court.

Here the government elected to follow the administrative route. *McComas* presupposed a determination would and should be made by the court as to whether the possession sought to be protected was lawfully acquired or whether one had been wrongfully interrupted in his possession. In this case the decision is that the courts have no jurisdiction to determine right or wrong as far as possession is concerned and must blindly enjoin mining merely because of the pendency of the administrative proceedings or an examiner's preliminary and wholly ineffective decision against a contestee.

VI

The decision converts the "holding hand" rule into a means for denial of due process of law

Where the United States has elected to proceed in the land office, the court must hold its hand. The decision here is to the effect that in such cases the courts may not examine into the title (for it is clearly in the United States) nor into the right of possession (which is essentially the mining claimant's right under the general mining law) for that is pending in the land office. Under the decision, therefore, there is no showing a mining claimant can make to successfully oppose an application by the government for an injunctive order pending the final outcome of the administrative proceedings.

VII

The decision places the United States in a position in which by merely electing to go into the department first it can deny the claimant the use of his claim pending a final agency decision

Under *Kennedy* it was clear that if the United States proceeded first in the courts, the courts had jurisdiction to afford relief.

By the simple device, made available under this decision, of *electing* to proceed first in the land office, the United States thereby elects to deprive the claimant of any opportunity of showing the validity or probable validity of his claim, and thereby elects to deny the claimant the use of his claim under the general mining laws for the slowly passing years while the administrative proceedings drag on to their ultimate final decision.

Wherefore, Appellants petition for a rehearing.

Dated January 8, 1969.

JOHN B. LONERGAN and
LONERGAN, JORDAN & GRESHAM,
By JOHN B. LONERGAN,
Attorneys for Appellants.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

JOHN B. LONERGAN

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED

JUL 6 1963

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22691

E. ARTHUR BARROWS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not enter an opinion.

JURISDICTION

This is an appeal from an order entered on December 7, 1967, granting a temporary injunction conditionally restraining the appellants from damaging the surface lands and property in question pending the administrative determination of the validity of the appellants' mining claim. Appellants were allowed by the order to continue to operate the claim and remove dirt, sand, gravel and other surface materials "as are normally replenished seasonally." The jurisdiction of the district court was invoked by the United States under 28 U.S.C. sec. 1345. Notice of appeal was filed January 8, 1968. The jurisdiction of this Court rests on 28 U.S.C. sec. 1292(1), authorizing interlocutory appeal from orders granting injunctions.

ISSUE PRESENTED

Whether the district court properly issued an injunction preventing permanent alteration of a tract of public domain pending final disposition of an administrative proceeding to determine the validity of that claim.

STATEMENT

This action was instituted by the United States with the filing of a complaint on June 8, 1967, seeking damages for trespass and conversion and an injunction prohibiting further operation of a sand and gravel plant on appellants' mining claim in the San Bernardino National Forest, California. After oral argument, an injunction was denied on September 1, 1967. Thereafter, the United States moved for a restraining order. Subsequent to further oral argument, an order granting a restraining order was issued by the court on October 19, 1967 (R. 264). Thereafter, the court, on December 7, 1967, entered a temporary injunction (R. 310), from which appeal was taken by the Barrows, et al., on January 8, 1968 (R. 314). Upon application by the United States, the injunction was modified on April 10, 1968. Appellants sought a stay pending appeal from this Court but it was denied by order of May 7, 1968.

The undisputed facts show that, in 1953, appellants, E. Arthur Barrows and Esther Barrows, posted and filed a location notice, later amended, whereby they purported to locate

a mining claim for sand and gravel in Grout Creek, a seasonal stream emptying into Big Bear Lake in the San Bernardino National Forest (R. 306, 308). In 1960, the Barrows leased the claim to appellant Seaman and Big Bear Rock and Materials Company, who have since conducted a sand and gravel operation, together with the other named appellants, claiming through the lessees (R. 307). In 1964, the Forest Service contested the validity of the claim for lack of timely discovery of a valuable mineral deposit prior to July 23, 1955, the effective date of the Common Varieties Act, 30 U.S.C. sec. 611. That Act precluded any further location of claims for certain common varieties of minerals, including sand and gravel. On March 14, 1966, in Contest No. 04879, the Hearing Examiner declared the mining claim to be null and void for lack of a timely discovery of a valuable mineral deposit (R. 307). A timely appeal of the decision was taken by appellants and is now in the process of determination before the Director of the Bureau of Land Management.

Pending final adjudication of the validity of appellants' mining claim, the United States applied to the district court for injunctive and other relief. After extensive proceedings, the district court found irreparable injury to the interests of the United States (R. 308) and concluded that a temporary injunction should issue subject to a condition (R. 309).

Appellants were allowed to continue to operate the claim pending administrative determination of the validity of the claim, on the condition that they would remove no more than "such amounts of sand, gravel and surface materials from the subject area as are normally replenished seasonally" (R. 310-311).^{1/} Appellants then appealed.

In March 1968, the United States moved to cite appellants for contempt for violation of the temporary injunction. After hearing, the district court determined that the injunction was not sufficiently specific to hold appellants in contempt and that intention to violate the injunction was not shown and denied the motion. At the suggestion of the court, the United States then applied for a modification of the injunction. On April 10, 1968, the district court modified the injunction to provide that appellants be allowed to continue to operate, on the condition that they remove only so much material in any given year as is seasonally deposited that year. Procedures for yearly calculation of the allowable level of excavation were specified.

^{1/} It appears that the district court derived the terms of the condition from the position the appellants had consistently maintained, i.e., that the United States would suffer no irreparable injury due to the operating of the claim because the excavations would be filled in by seasonal depositing during each year. Such representations are found in appellants' Answer (R. 63), Affidavit of Barrows (R. 75), Affidavit of Home (R. 107) Counter Memorandum (R. 111), Proposed Findings (R. 145), Second Affidavit of Barrows (R. 200-202), and Objections to Government Proposed Findings and Conclusions (R. 279-281).

ARGUMENT

THE DISTRICT COURT PROPERLY ISSUED
THE TEMPORARY INJUNCTION PENDING
ADMINISTRATIVE DETERMINATION OF THE
VALIDITY OF THE MINING CLAIM

A. The district court had jurisdiction to consider
the question of interim relief pending administrative action. -

Jurisdiction over this case was invoked under 28 U.S.C. sec. 1345. The district court concluded that, while jurisdiction to determine the validity of the claim rested in the Department of the Interior, the court was not deprived of jurisdiction to maintain the status quo during the pendency of administrative proceedings (R. 308). Such decision was plainly correct.

There is, of course, no question of the right of the United States to bring a suit as plaintiff in the district court, nor is there any question of personal jurisdiction over the defendants. The only possible problem is the possible exclusion of trial court jurisdiction because of the subject matter of the case. The land, of course, is admittedly owned by the United States, and private title thereto can be created only pursuant to act of Congress, in the present posture only by a patent issued by the Secretary of the Interior. It is thus clear that the court has no jurisdiction to adjudicate title to the property.

On the other hand, it has long been settled under the mining laws that the courts have authority to adjudicate rights to possession of public domain founded on mining locations. Archer v. Greenville Gravel Co., 233 U.S. 60, 65 (1914); Erhardt v. Boaro, 113 U.S. 537, 539 (1885). And as to public lands, the courts have always been open to private litigants to determine possessory rights. Gauthier v. Morrison, 232 U.S. 452, 461 (1914). In that connection, the courts may adjudicate the validity of the mining location, even though that adjudication will not bind the Secretary of the Interior in later determining the validity of a patent application. Perego v. Dodge, 163 U.S. 161, 168 (1896). And when administrative proceedings are pending as to title, "The jurisdiction of the state court to rule upon the question of right of possession is not withdrawn * * *." Bowen v. Chemi-Cote Perlite Corporation, 102 Ariz. 423, 432 P.2d 435, 443 (1967).^{2/} In Northern Pac. Ry. Co. v. McComas, 250 U.S. 387, 392 (1919), the Court summarized the situation as follows:

The situation then at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers

^{2/} Of course, this equally applies to federal courts where appropriate federal jurisdiction exists over a possessory dispute.

were specially charged by law with their examination and determination and with the disposal of the title accordingly. It is settled that in such a situation the courts may not take up the adjudication of the pending claims, but must await the decision of the land officers and the issue of patents in regular course. Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 592-594; Brown v. Hitchcock, 173 U.S. 473; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301, 315; Humbird v. Avery, 195 U.S. 480, 502. There is, however, a related jurisdiction which the courts may exercise pending the final action of those officers; they may protect a possession lawfully acquired or restore one wrongfully interrupted, for that is a matter which is not confided to the Land Department and may be dealt with by the courts in the exercise of their general powers. Gauthier v. Morrison, 232 U.S. 452, 461.

It is also well settled that generally the United States as a property owner is in no worse position than other property owners. This Court has recognized the right of the United States to bring appropriate action where the defendant claims possessory rights under the mining or other laws. "In general, the courts are open to the United States, and no statute closes them to it in matters of public land other than transfer of title." United States v. Schultz, 31 F.2d 764 (N.D. Cal. 1929). And the United States has been granted an injunction by the court to prevent harm to federal lands pending administrative action. In Kennedy v. United States, 119 F.2d 564, 565 (C.A. 9, 1941), this Court quoted with approval

from the Schultz opinion in enjoining Kennedy from grazing cattle on federal land pending action by the United States to designate the lands to be included in a grazing district under the Taylor Grazing Act.

The distinction between possessory actions and the determination of validity of unpatented mining claims was recognized in Best v. Humboldt Mining Co., 371 U.S. 334 (1963), when Mr. Justice Douglas wrote (at 340):

Institution of suit is one way to obtain immediate possession; and we see nothing incompatible between the use of that means to obtain possession and the use of the administrative proceedings to determine title.

Whereas in that case the United States obtained possession by instituting a condemnation action, here it seeks only regulation of claimants' possessory interest. The proper forum for such request must be the district court. The Department of the Interior has no police power to regulate use of a claim pending the outcome of the administrative determination of the validity thereof. Gauthier v. Morrison, 232 U.S. 452, 461 (1914). The oft-cited plenary powers of the Department pertain only to the validity question. The United States is powerless to protect the interests of the people in this situation unless it has recourse to the courts to prevent irreparable harm to its own lands. Moreover, in the instant case, while not final, the decision of the Hearing Examiner at least raises grave questions as to validity of the claims.

B. The district court properly issued a temporary injunction under the circumstances of this case. - Rule 65, F.R.Civ.P., gives the district courts the power to enjoin or restrain a party to a controversy pending its final outcome. And the courts exercise considerable discretion regarding such relief. Yakus v. United States, 321 U.S. 414, 440 (1944); International Manufacturing Co. v. Landon, Inc., 327 F.2d 824, 825 (C.A. 9, 1964); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (C.A. 9, 1963). Further, the courts will avoid inconvenience and injury as far as possible by attaching conditions to the award. Yakus v. United States, supra, 321 U.S. at 440.

Injunctive relief is generally available to the United States where irreparable injury will be done to its lands. Light v. United States, 220 U.S. 523, 537 (1911); In re Debs, 158 U.S. 564, 588-593 (1895); United States v. Petersen, 91 F.Supp. 209, 213 (S.D. Cal. 1950), aff'd 191 F.2d 154, cert. den. 342 U.S. 885. It follows therefore that the district court could also grant temporary injunctive relief in matters concerning federal lands where it had obtained jurisdiction.^{3/}

The injunction itself is reasonable in its terms. Appellants consistently maintained that each year seasonal floods would deposit as much material as they would remove in their

^{3/} See: Note, Interim Injunctive Relief Pending Administrative Determination, 49 Columbia L. Rev. 1124.

sand and gravel operation (R. 63, 75, 107, 111, 145, 200-202, 279-281). The district court intended that the operation of the claim be limited only in this aspect, that mining be confined to actual seasonal replenishment and thereby irreparable injury to the United States would be prevented. If the appellants' representations were true, they would suffer no hardship under such a condition. The order of the court was couched in their terms and they should not now be heard to complain thereon.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Respectfully submitted,

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JULY 1968

Civil No. 22,692 ✓

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDITH G. BAILEY,

Appellant

v.

THE UNITED STATES,

Respondent

JUN 24 1968

APPELLANT'S BRIEF

Appeal from the Judgment of the United States
District Court, Eastern Division
State of California

Honorable Sherrill Halbert, Judge

EDITH G. BAILEY, Appellant
In Propris Personae

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDITH G. BAILEY,

Appellant

v.

THE UNITED STATES,

Respondent

APPELLANT'S BRIEF

Appeal from the Judgment of the United States
District Court, Eastern Division
State of California

Honorable Sherrill Halbert, Judge

STATEMENT OF THE CASE

Appellant herein, Edith G. Bailey, was employed on July 7, 1957, at McClellan Air Force Base, California, as a civil service employee, classification GS-7 Information Specialist. On November 27, 1960, appellant was promoted to classification GS-9 News Writer; and later reduced to GS-5 News Writer on March 5, 1961.

Appellant filed appeal to the 12th Civil Service Regional Office, San Francisco, on March 15, 1961, from the reduction to GS-5. There was an adverse determination of the appeal of March 15, 1961. Appellant thereupon appealed to the Commission's Board of Appeals and Review, Washington, D. C., on May 16, 1961. Appeal was then made to the Office of the President of the United States, on November 24, 1961. This last appeal was referred to the Commission. On November 29, 1961,

the Commission advised appellant that its decision of June 29, 1961, was final, and that appellant had exhausted her appeal rights.

Executive Orders 10987 and 10988, dated January 18, 1962, were interpreted by appellant as providing a method of appeal from the adverse determination of her claim by the Civil Service Commission. Section 14 of Order No. 10988 reads in part, as follows:

"The head of each agency, in accordance with the provisions of this order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles under section 14 of the Veterans' Preference Act of 1944, as amended. . . ."

Appellant attempted to reopen her case on appeal by means of letters to the 12th Civil Service Regional Office on May 17, 1964 and to the Commission's Board of Appeal and Review on June 29, 1964. On August 11, 1964, the Commission stated she had no basis for further Commission review.

In Court of Claims #48-65, June 8, 1965, appellant filed a petition in propria persona of claim for declaration of her rights in the U. S. Court of Claims, Washington; this was dismissed without prejudice by the Court of Claims. On December 2, 1966, appellant filed the second claim, Court of Claims #13-66, which claim was dismissed for lack of jurisdiction and laches.

The action from which appeal is taken was filled March 5, 1967.

STATEMENT OF FACTS

Appellant was employed on July 7, 1957, at McClellan Air Force Base, California, as a civil service employee, classification GS-7 Information Specialist. Appellant was assigned duties of a GS-9 position on January 10, 1960. Appellant was denied promotion to Grade GS-9 and remained a GS-7 to

1 serve a trainee period before becoming eligible for the GS-9. In July 19
2 appellant's supervisor advised her that she was not eligible for the
3 classification of GS-9, and on September 1, 1960, appellant was officiall
4 assigned new duties. The duties of her new position were as editor of
5 the base newspaper, also a GS-9 position. Appellant was advised she woul
6 be promoted to the GS-9 after serving a probationary period.

7 Appellant contested the failure to raise her classification to the
8 GS-9 rating called for by the work assigned. Appellant filed a grievance
9 on August 19, 1960, after informal discussions did not resolve the issue.
10 Numerous delays followed and on October 10, 1960, an informal hearing,
11 taped and transcribed, was unsuccessful in resolving the grievance.
12 Appellant then filed a formal grievance, sending a copy of the grievance
13 outlining her complaint to the base Civilian Personnel Officer. In Novem
14 ber 1960, the base Civilian Personnel Officer offered appellant an immed
15 iate promotion to a GS-9 classification if she would withdraw her grievan
16 After being assured this offer was made in good faith, appellant withdrew
17 the grievance.

18 Appellant's promotion was effective on November 27, 1960. On
19 December 14, 1960, appellant was notified her position was being abolish
20 by a reduction-in-force action. On March 5, 1961, her position was
21 abolished and she was reassigned as a GS-5 News Writer.

22 Appellant then filed a grievance based on lack of good faith in
23 this action. She exhausted her administrative remedies. She enlisted
24 the assistance of a Congressman, who was unable to help her.

25 After the issuance of Executive Order 10988, which permitted all
26 civil service employees, not just veterans, to question the good faith

of personnel actions, appellant again pursued a course through administrative channels and upon exhausting these remedies, she turned to the judicial branch.

I

APPELLANT'S CLAIM IS NOT BARRED BY LACHES

In the Memorandum and Order filed herein January 2, 1968 the trial Court held ". . . that this action is barred by laches." The Court further states ". . . plaintiff states that her delay in filing suit here resulted from mistakenly pursuing her remedies in the Court of Claims. This contention is without merit since the records of that Court show that her first petition was filed on February 11, 1965 over 43 months after the final administrative action noted above."

It is respectfully submitted that the Court below erred in this holding.

Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, (Kawneer v. U. S., 100 Ct.Claims 523) resulting in a disadvantage to the other party, (Robinson v. Linfield College, D. C. Washington 42 F.Supp. 147) 30A C.J.S. 20. (Emphasis added.)

The delay here is not unexplained. From March 15, 1961 through November 29, 1961, appellant pursued her administrative remedies.

Subsequent to the Executive Orders dated January 18, 1962, appellant pursued her administrative remedies and on August 11, 1964, appellant was advised that she had no basis for further Commission review.

1 In 1965, appellant filed for judicial review in the Court of Claims.

2 Her first complaint before that body was dismissed without prejudice
3 June 8, 1965.

4 On January 11, 1966, appellant filed a second petition in the Court
5 of Claims; this second petition was dismissed for failure to state a claim
6 within the jurisdiction of the Court and because the claim was barred by
7 laches.

8 In 30A, C.J.S. 23, in a discussion of laches it is stated as follows:

9 "A stale claim or demand in its proper sense is one which
10 for a long time has remained unasserted; one which is first
11 asserted after an unexplained delay of such great length as to
12 render it difficult or impossible for the court to ascertain
13 the truth of the matter in controversy and do justice between
14 the parties, or as to create a presumption against the exist-
15 ence or validity of the claim, or a presumption that it has
16 been abandoned or satisfied." (Emphasis added.)

17 Under the circumstances of the present case appellant's claim is
18 seven years old. It has not remained unasserted. Appellant asserted her
19 case through the proper administrative channels, citing Air Force regula-
20 tions Ch AFP2, AFM 40-1, and SMAMA Regulation 40-13, 22 Apr 59; the Classi-
21 fication Act of 1949, as amended, governing the Civil Service Commission
22 actions; Public Law 253-82d Congress; and Executive Orders 10987 and 10988.

23 There has been no unexplained delay of the assertion of appellant's
24 right which would render it either difficult or impossible for the Court
25 to ascertain the truth of the matter in controversy. The Court below has
26 available complete records of all transactions involving appellant's
27 asserted right.

28 There can be no presumption created against the appellant or arising
29 against appellant to question the existence or validity of her claim.

1 Appellant has twice pressed her claim through the administrative proced-
2 set up by the Air Force and the Civil Service Commission; appellant has
3 twice brought her claim before the U. S. Court of Claims.

4 There can be no presumption that appellant's claim has been abandon-
5 or satisfied.

6 II

7 APPELLANT HAS NOT HAD HER DAY IN COURT

8 Appellant herein has twice appealed before the Court of Claims to p-
9 her claim to judicial determination of her claim. Both appearances befo-
10 the Court of Claims were made in propria persona.

11 Appellant is presumed to know the law. Her first petition before t-
12 Court of Claims was dismissed without prejudice and with no direction.
13 Appellant questioned the good faith of the reduction-in-force action whi-
14 reduced her four civil service grades. In 67 C.J.S. 261 it stated as
15 follows:

16 "It is generally the rule that power exists to dismiss
17 an employee in the civil service where the working force is
18 reduced for reasons of economy, even in the absence of abo-
19 lition of the position, or where the office abolished in good
20 faith, as in the case of a good-faith reorganization of the
21 department with a view to securing greater efficiency
22 The power to abolish a position may not, however, be used to
23 effect the discharge (Ed.: and therefore, impliedly, the
24 demotion) of an employee protected by the provisions of civil
25 service regulation unless such power is exercised in good
26 faith."

27 Until the advent of Executive Order 10988, effective July 1, 1962,
28 was impossible for appellant to question the "good faith" demotion incur-
29 by her.

1 Conclusion:

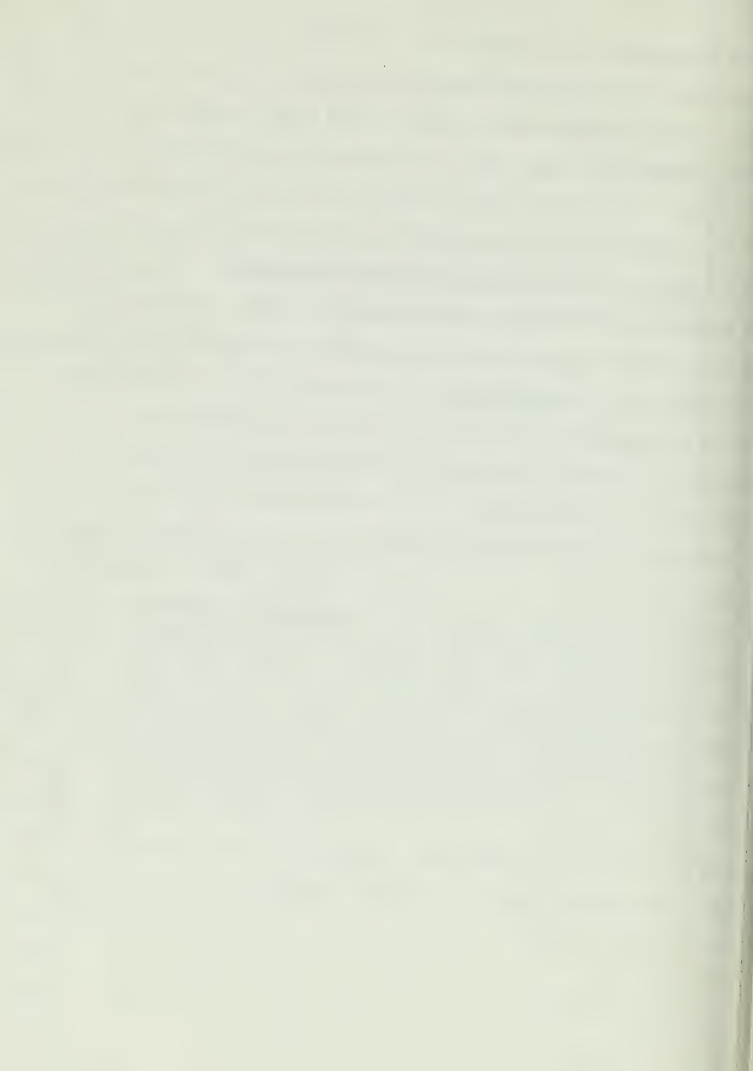
2 Appellant respectfully submits that the decision of the court that her
3 attempt to adjudicate her rights in the Federal District Court is the
4 placing of a stale claim is not supported by the facts. Appellant did not
5 "sit on her rights", but followed them with due diligence through changes
6 in administrative procedures, through court actions filed in propria
7 personna which were dismissed without direction as to correct procedure
8 until at last she is forced to appeal for justice to this Court.

9 It is suggested that the judgment of the Court below be reversed with
0 direction to hear appellant's claim.

1 Dated: 6 June 1968

2 Respectfully submitted,

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5 EDITH G. BAILEY
6 Appellant
7 In Propria Persona
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDITH G. BAILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 22692

BRIEF FOR APPELLEE

FILED

JUL 19 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDITH G. BAILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 22692

BRIEF FOR APPELLEE

JURISDICTION

The plaintiff filed this action in the United States District Court for the Eastern District of California to review an adverse decision of the United States Civil Service Commission in connection with her employment at McClellan Air Force Base, California. This appeal is taken from a summary judgment in favor of the defendant entered by the District Court on January 17, 1968.

Jurisdiction in the District Court was apparently predicated on the provisions of Title 5 U.S.C. § 704 and Title 28 U.S.C. § 1346(a)(2). Jurisdiction in this Court is invoked under Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

On March 5, 1961, the Department of the Air Force reduced the plaintiff from the position of Newswriter GS-9 to the position of Newswriter GS-5 at McClellan Air Force Base in Sacramento, California as a result of the cancellation of her former position due to changes in workload and reductions in manpower allotments.

The plaintiff filed an appeal with the Civil Service Commission's San Francisco Regional Office on March 15, 1961.^{1/} That appeal was denied on May 9, 1961.^{2/} The Regional Office decision held that all procedural requirements had been met in plaintiff's case and that the action taken was under Commission regulations.

Plaintiff appealed the decision of the San Francisco Regional Office to the Commission's Board of Appeals and Review by letter dated May 16, 1961.^{3/} In a decision letter dated June 29, 1961,^{4/} the Board stated that the total evidence reflected that plaintiff had been properly

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- ^{1/} Enclosure 1 in Defendant's Exhibit A.
^{2/} Enclosure 4 in Defendant's Exhibit A.
^{3/} Enclosure 5 in Defendant's Exhibit A.
^{4/} Enclosure 6 in Defendant's Exhibit A.

1964,^{8/} plaintiff requested that the Commission's Board of Appeals and Review consider her previous representations with respect to her case to ascertain whether the Commission has any further appellate jurisdiction. By letter dated August 11, 1964,^{9/} the Board advised plaintiff that she had no basis for further Commission review of her case and that if she desired, she could avail herself of the appropriate internal grievance procedures within her employing agency.

On February 11, 1965, plaintiff filed a petition with the United States Court of Claims. It was dismissed without prejudice on June 8, 1965. Bailey v. United States, Ct. Cl. No. 48-65. She filed a second petition with the Court of Claims on January 11, 1966, which was dismissed on December 6, 1966 for lack of jurisdiction and laches. Bailey v. United States, Ct. Cl. No. 13-66.

The present action was filed in the District Court on March 6, 1967. On January 17, 1968, the District Court entered summary judgment for the defendant on the ground of laches. From this judgment the plaintiff now appeals.

^{8/} Enclosure 10 in Defendant's Exhibit A.

^{9/} Enclosure 11 in Defendant's Exhibit A.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN FINDING
THAT THE PLAINTIFF'S CLAIM WAS BARRED BY
LACHES.

The final action taken by the Civil Service Commission in plaintiff's case was on June 29, 1961, when the Board of Appeals and Review denied her appeal. She did not file the instant suit until March 8, 1967, 68 months later. The doctrine of laches has been repeatedly applied with strictness to Government employees seeking similar relief where the delay was far shorter.10/

In the District Court, the plaintiff argued that the delay in filing suit resulted from mistakenly pursuing her

10/ See United States ex rel. Arant v. Lane, 249 U.S. 367 (1919) [20 months]; Nicholas v. United States, 257 U.S. 71 (1921) [36 months]; Norris v. United States, 257 U.S. 77 (1921) [11 months]; Corrington v. Webb, 375 F.2d 298 (9th Cir. 1967) [34 months]; Gersten v. United States, 364 F.2d 850 (Ct. Cl. 1966) [65 months]; Zuckert v. Peterson, 321 F.2d 749 (D.C. Cir. 1963) [48 months]; Chappelle v. Sharp, 301 F.2d 507 (D.C. Cir. 1961) [34 months]; Jones v. Summerfield, 265 F.2d 125 (D.C. Cir. 1959) [33 months]; Drown v. Higley, 244 F.2d 774 (D.C. Cir. 1957) [27 months]; O'Connor v. Summerfield, 239 F.2d 69 (D.C. Cir. 1956) [28 months]; Haas v. Overholser, 223 F.2d 314 (D.C. Cir. 1955) [25 months]; and Grasse v. Snyder, 192 F.2d 35 (D.C. Cir. 1951) [16 months].

remedies in the Court of Claims. Yet, as the District Court pointed out, more than 43 months passed from the final administrative action until the plaintiff first brought suit in the Court of Claims.

The plaintiff also argues in her brief on appeal that she was further pursuing her administrative remedies from March 15, 1961 through November 29, 1961 and subsequent to 1962.^{11/} By this she is probably referring to her telegram to the President on November 24, 1961;^{12/} the response of November 29, 1961;^{13/} her letters of May 17, 1964 and June 29, 1964 to the Civil Service Commission;^{14/} and the reply from the Board of Appeals and Review.^{15/} (The plaintiff still offers no explanation for the 30 month delay between November 29, 1961 and May 17, 1964.) However, as the plaintiff was advised by the Board of Appeals and Review in their letter of November 29, 1961 and again in their letter of August 11, 1964, the decision of June 29, 1961 constituted the final administrative disposition of her case.

^{11/} Appellant's Brief, p. 4

^{12/} Enclosure 7 in Defendant's Exhibit A.

^{13/} Enclosure 8 in Defendant's Exhibit A.

^{14/} Enclosures 9 and 10 in Defendant's Exhibit A.

^{15/} Enclosure 11 in Defendant's Exhibit A.

"The seeking of administrative relief which is not a prerequisite to the filing of a proper suit has often been held an inadequate excuse." Gersten v. United States, 364 F.2d 850, 852 (Ct. Cl. 1966).

Similar explanations for delay in bringing suit following the final administrative disposition have repeatedly been held inadequate. Thus, in Jones v. Summerfield, 265 F.2d 125 (D.C. Cir. 1959), the plaintiff's claim was held to be barred by laches although during the 33 months before bringing suit he had written to various officials and was awaiting the results of cases filed in other courts. Also, in Grasse v. Snyder, 192 F.2d 35 (D.C. Cir. 1951) a summary judgment for the defendant on the ground of laches was affirmed despite the fact that the plaintiff was writing vitriolic letters about his discharge to various influential people during the 16 months between the final agency disposition and the bringing of suit. Similar explanations were also rejected in Drown v. Higley, 244 F.2d 774 (D.C. Cir. 1957) and Bailey v. United States, 171 F.Supp. 281 (Ct. Cl. 1959).

Finally, the plaintiff argues that her delay has not

prejudiced the Government in this action. However, as noted in Gersten v. United States, supra, at p. 852:

" . . . the longer the delay the less need there is to show, or search for, specific prejudice, and the greater the shift to the plaintiff of the task of demonstrating lack of prejudice."

As the District Court observed in its Memorandum and Order, the delay of over 68 months in this case is unreasonable on its face.

Moreover, prejudice to the Government from delay in a case of this nature results not only from the possible loss of evidence. More importantly the prejudice lies in the fact that the plaintiff seeks to recover back pay for the last seven years for a position which she has not held. Thus, in United States ex rel. Arant v. Lane, 249 U.S. 367, 372 (1919), the Supreme Court said:

"Such a long delay must necessarily result in changes in the branch of the service to which [the plaintiff] was attached, and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in

the interests of justice and sound public policy."16/

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN P. HYLAND
United States Attorney

By *William B. Shubb*

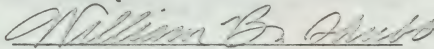
WILLIAM B. SHUBB
Assistant U. S. Attorney

16/ Cf. Bailey v. United States, supra, at p. 282, wherein the Court said:

"The Government has the right to have its services disturbed as little as possible, and the Government should not be obliged to pay the salaries of two persons for a single service due to delay over a long period of time. The Supreme Court and this court have consistently, and in a large number of cases, applied the bar of laches . . ."

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



WILLIAM B. SHUBB
Assistant United States Attorney

JUL 1968

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES NATIONAL BANK OF
OREGON, PORTLAND, OREGON,

Appellant,

v.

ASOCIACION de AZUCAREROS de
GUATEMALA 4a. Av. 14-53 (1)
GUATEMALA CITY, GUATEMALA,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for
the District of Oregon*

HONORABLE ROBERT C. BELLONI, Judge

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the District of Oregon*

HONORABLE ROBERT C. BELLONI, Judge

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court to hear this case was based upon 28 U.S.C. 1332 (a) (2), plaintiff-appellee being a citizen of Guatemala, all of the defendants being citizens of the State of Oregon, and the amount in controversy exceeding

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*Appeal from the United States District Court for
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HONORABLE ROBERT C. BELLONI, Judge

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court to hear this case was based upon 28 U.S.C. 1332 (a) (2), plaintiff-appellee being a citizen of Guatemala, all of the defendants being citizens of the State of Oregon, and the amount in controversy exceeding

the sum of \$10,000 (R. 69). The jurisdiction of this court to review the District Court's judgment is based upon 28 U.S.C. 1291.

STATEMENT OF CASE

Appellee, Asociacion de Azucareros (Association), commenced this action against Phillip S. Greenberg (Greenberg) and PSG Co. (PSG) to recover damages upon a series of claims, including alleged defaults in payments claimed due under a contract for the sale of sugar, dated May 20, 1966 (hereafter GARDENIA sugar and GARDENIA contract). PSG asserted four counterclaims against the Association, seeking damages for breach of three contracts (including the GARDENIA contract) and for wrongfully inducing an Association member to breach contracts with PSG (R. 69, 70). As a corollary to its action against PSG and Greenberg the Association also sought recovery against appellant, United States National Bank of Oregon (Bank), for amounts alleged to be payable under a letter of credit securing Greenberg's and PSG's obligation under the GARDENIA contract.

The issues between the Association and the Bank were segregated and tried first, resulting in judgment against the Bank in the amount of \$250,135.25 (R. 113). The issues between the Association and PSG and Greenberg were later compromised (R. 102).

The Bank's involvement herein grows out of the letter of credit arrangement devised by the Associa-

tion and PSG for payment of the purchase price of the GARDENIA sugar. Under the terms of the GARDENIA contract and an earlier master contract dated June 22, 1965, payment for sugar sold to PSG was to be effected under irrevocable letters of credit for 95 percent of the value of any shipment. Payment of the final five percent was to be made following final commercial liquidation of the shipment by PSG (Exs. 1 and 18; R. 70, Par. 1). The GARDENIA agreement provided for the sale to PSG of approximately 10,500 long tons bulk centrifugal raw sugar polarizing at 96° (Ex. 18; R. 70, 71, Par. 2). Pursuant to the payment arrangement established between PSG and the Association, the Bank issued its irrevocable letter of credit No. 11561 to the Association for the account of PSG. The letter of credit provided for drafts to be drawn at sight for 95 percent of full invoice value, accompanied by documents evidencing shipment of 5,000 long tons Guatemala bulk raw centrifugal sugar, 1965-66 crop, basis 96° minimum polarization (R. 71, Par. 4). This was a back-to-back letter of credit transaction in that PSG was the beneficiary of a letter of credit issued by J. Henry Schroder Banking Corp. to secure the resale of the sugar to a New York buyer (R. 72, Par. 8).

Subsequent amendments to the credit nominated the GARDENIA as the vessel to transport the sugar and provided for two separate drafts against the credit; the first to cover the portion of the sugar eligible for immediate admission into the United States, and the second to cover sugar not yet eligible for entry under

the United States sugar quota system (R. 71, 72, Par. 5). Payment on the second draft was authorized only when the sugar became eligible for admission, and was subject to "deductions by United States National Bank of all charges incurred prior to obtaining admission of the sugar to the United States" (R. 72, Par. 5). The credit was also amended to reduce the first draft to 90 percent of invoice value, or \$335,198.30 (Tr. 243, 244). None of the preceding amendments are in controversy in the instant appeal.

On or about August 22, 1966, the Bank received the shipping documents which were to support the first draft under the letter of credit (R. 72, Par. 7). It was immediately apparent to the Bank that the documents failed to comply with the requirements of the credit in several particulars, including the failure of the commercial invoice to specify the polarization of the sugar (Tr. 79, 83). At the same time, however, Greenberg informed the Bank that the sugar itself failed to meet the 96° minimum polarization requirement established in the credit (Tr. 82). Greenberg also informed the Association of the deficiencies in the polarization of the sugar, and the Association agreed with Greenberg to a reduction of the first draft to 75 percent of invoice value, which would be \$279,331.92 (Tr. 208-214).

At the time of the negotiations in question the available tests indicated that the sugar was polarizing as much as 2.7° below the 96° minimum established in the GARDENIA contract and in the credit (Ex.

224). In fact, the sugar never did reach the 96° minimum. Final test results established that the average polarization of the GARDENIA sugar was 95.176358 (Ex. 223). Although the Bank received payment on behalf of PSG under the Schroder credit, it was understood that PSG might have to make subsequent adjustments with the New York buyer to compensate for deficiencies in the quality of the GARDENIA sugar (Tr. 98). At Greenberg's request and to obtain approval of proposed reduction by the Association and its bank, the Bank sent the following cable to Banco del Agro, S. A., the Association's bank in Guatamala (Tr. 84, 95):

"174 REFERENCE OUR LETTER CREDIT 11561 POLARIZATION BELOW CREDIT REQUIREMENT ASAZGUA [the Association] WILL AUTHORIZE DRAFT COVERING 2917 LONG TONS AT 75 PERCENT INVOICE VALUE PLEASE OBTAIN THEIR APPROVAL AND CABLE US URGENTLY TODAY NECESSARY AUTHORITY TO ALTER DRAFT TO 75 PERCENT INVOICE VALUE ADVISE US CORRECTED DRAFT AMOUNT. UNITBANK." (Ex. 54)

The Association received the cable through its bank and accepted it as confirmation of Greenberg's representations regarding the commodity (Tr. 224, 225). By cable dated August 28, 1966 and by letter dated August 31, 1966, Banco del Agro, S.A. confirmed on behalf of the Association the reduction of the first draft to 75 percent of invoice value (Exs. 212, 58). The trial court found that the cable constituted

a false representation as to the quality of the sugar, that the Bank either knew or should have known that it was false, and that the Association relied upon the representation of the Bank that the sugar was of low polarization (R. 107, paras. 10, 13). On the basis of these findings the trial court held the Bank liable for the difference between 75 percent invoice value and 90 percent invoice value, or \$55,866.38, plus interest. The Bank has assigned these findings as error.

The second draft against the letter of credit was also reduced to 75 percent of invoice value, and substantial deductions were made from that draft for alleged charges for procuring admission of the sugar into the United States (R. 73, 74, paras. 13, 14). The trial court again found that the Bank's cables requesting confirmation of proposed amendments of the second draft constituted representations as to the quality of the sugar and not as to the compliance of the documents, that such representations were false, and further that the Association had never accepted the amendment but had only made a counterproposal (R. 108, par. 16). The finding that the Association never accepted the amendment of the second draft is not contested in this appeal.

After the court rendered its decision from the Bench, and before judgment was entered against the Bank, the Association, Greenberg, and PSG entered into an agreement of release and satisfaction (R. 124). Pursuant to the terms of that agreement, reproduced as Appendix B to this brief, the Association released

all its claims against Greenberg and PSG, totalling approximately \$899,000, including its \$258,954 claim for the unpaid purchase price of the GARDENIA sugar. In return, PSG and Greenberg released claims against the Association, totalling approximately \$1,-265,000. The Bank did not consent to the release and satisfaction (R. 125) nor was there any attempt to reserve the Association's claims against the Bank in that document. On discovery of the release and satisfaction, the Bank moved the court to amend its Findings of Fact, Conclusions of Law and Judgment to show that any debt which the Bank formerly owed the plaintiff was satisfied. In the alternative, the Bank moved to be relieved of the judgment entered against it on the ground that the judgment had been discharged (R. 117-127). The Bank's motion was denied by the court on November 29, 1967, without opinion (R. 135-136), and the Bank has assigned denial of this motion as error.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Does a letter of credit transaction in which both the issuing bank and the buyer are obligated to the seller, and the issuing bank has a right of reimbursement from the buyer, constitute a suretyship relation in the broad sense?

2. Where a seller in a letter of credit transaction gives the buyer a full release from his obligation to pay for the commodity and the seller in the release

fails to reserve his rights against the issuing bank, is the issuing bank discharged from its obligation to honor drafts drawn under the letter of credit?

3. Where the seller in a letter of credit transaction gives a full release to the buyer, but fails to expressly reserve his rights against the issuing bank, is the discharge of the issuing bank prevented by the fact that the seller had assumed that he would still have a right to proceed against the issuing bank?

4. Is the seller in a letter of credit transaction entitled to only one recovery of the purchase price of the commodity?

5. Where the seller in a letter of credit transaction enters into a mutual release with the buyer in which the seller releases the buyer from his obligation to pay for the commodity in return for the buyer's release of the seller from claims in excess of the purchase price, must the agreed satisfaction of the purchase price be taken in mitigation of the seller's damages resulting from the issuing bank's failure to honor the letter of credit?

6. Where a letter of credit requires documents evidencing shipment of sugar "basis 96° minimum polarization" could the issuing bank properly use the phrase "polarization below credit requirement," to inform the beneficiary that the sugar was not polarizing at the level specified in the letter of credit?

7. Can the beneficiary of a letter of credit avoid its prior reduction of a draft against the credit for

misrepresentation where the representation relied upon was in fact true but the beneficiary construed it incorrectly?

SPECIFICATION OF ERRORS

1. The trial court erred in failing to grant the Bank's post-trial motion which was based upon the ground that the Bank's obligation to the Association was discharged or satisfied by the Association's release of PSG and Greenberg from any liability for the purchase price of the sugar, in return for PSG's and Greenberg's release of their claims against the Association.

2. The trial court erred in finding that the Bank's August 26, 1966 cable to the Association constituted a misrepresentation vitiating the Association's consent to the reduction of the first draft. Accordingly the court erred in finding the Bank liable to the Association on the first draft in the amount of \$55,-866.38.

SUMMARY OF ARGUMENT

1. The Association's release of PSG and Greenberg from liability for the purchase price of the GARDENIA sugar, without an express reservation of rights against the Bank, discharged the Bank from any liability under the letter of credit securing that sale. The parties to a letter of credit transaction are in a suretyship relation in the broad sense. Both the

issuing bank and the buyer are obligated to the seller, who is entitled to but one payment for his goods; as between the issuing bank and the buyer, the ultimate burden of paying for the goods will fall on the buyer because of the bank's right of reimbursement. Thus, the issuing bank is the surety, and the buyer is the principal. Under the law of suretyship, the seller's release of the buyer, without reservation of his rights against the bank, as surety, constitutes a discharge of the bank. The mere fact that the seller did not intend to discharge the bank does not prevent the discharge unless a reservation of rights is expressly included in the instrument of release.

Even in the absence of a suretyship relation, the mutual releases constituted an agreed satisfaction of the purchase price of the sugar and must be taken in mitigation of the Association's damages resulting from any breach of the letter of credit by the Bank. The Association is entitled to but one payment of the purchase price of the sugar, and its damages against the Bank are mitigated by whatever the Association realizes from the sale or disposition of the sugar. The Association, having accepted PSG's and Greenberg's release of their counterclaims as an agreed satisfaction for its claim against them for the purchase price of the sugar, may not now seek additional satisfaction from the Bank. The Association has mitigated its damages.

2. The letter of credit in controversy specified documentation evidencing shipment of sugar

“basis 96° minimum polarization.” The letter of credit itself, related documents and the parties used “credit” and “letter of credit” interchangeably. The controlling law as contained in the Uniform Commercial Code also uses the terms as equivalents. In this context the cable advising the Association

“REFERENCE OUR LETTER CREDIT
11561 POLARIZATION BELOW CREDIT
REQUIREMENT”

was equivalent to advice that the sugar did not polarize at the 96° minimum specified in the letter of credit.

The Association cannot avoid its reduction of the first draft on the basis of misrepresentation where all of the evidence offered on trial conclusively establishes the sugar polarized below 96°. There is no basis in the letter of credit transaction or elsewhere in the relationship of the parties to justify the Association's belief that the cable represented the sugar as polarizing below 94°. Such misinterpretation constitutes a unilateral mistake on the Association's part, and it cannot avoid the reduction of its draft where the Bank has materially changed its position.

ARGUMENT

I

The Association's release of PSG and Greenberg from any liability for the purchase price of the sugar, in return for PSG's and Greenberg's release of their claims against the Association, discharged or satisfied the Bank's obligation to the Association based upon the letter of credit.

Within ten days of the trial court's entry of its judgment in favor of the Association (R. 113), the Bank filed its motion under Rules 52(b), 59(a), 59(e) or 60(b)(5) and (6) of the Federal Rules of Civil Procedure (R. 117). The applicable provisions of the Federal Rules of Civil Procedure are set forth in Appendix C of this brief. The motion requested that the trial court amend its findings of fact and conclusions of law and its judgment in order to show that any obligation of the Bank to the Association had been satisfied or discharged (R. 117-18, paras. 1, 2). In the alternative, the Bank sought to be discharged from the judgment upon the same grounds (R. 118, par. 3).

The motion and accompanying affidavits recited that in this action the Association was asserting a claim against the Bank for \$252,247.79 based upon the Bank's refusal to pay drafts drawn under the letter of credit which was issued to secure the GARDENIA shipment. The Association had also asserted a claim against PSG and Greenberg for \$258,954.75, representing the unpaid purchase price of the GARDENIA sugar (R. 118, par. 4(a); R. 75, paras. 3, 4).

The Association had asserted other claims against PSG and Greenberg totalling approximately \$639,813 (R. 119, par. 4(b) ; R. 75-76).

PSG had admitted that it owed the Association \$244,730.30 on the purchase price of the GARDENIA sugar (R. 119, par. 4(b) ; R. 74, par. 15), but PSG and Greenberg had asserted setoffs and counterclaims against the Association totalling approximately \$1,-265,423 (R. 119, par. 4(b) ; R. 77-79). The parties had agreed that the Association's claim against the Bank would be tried first, to be followed by the trial of the issues between the Association and PSG and Greenberg (R. 153).

The motion and affidavits recite that, after the trial court had made its oral findings on October 27, 1967 against the Bank, the Association and PSG and Greenberg entered into a "Full and Final Release of All Claims" against each other (R. 119, par. 4(c) ; R. 122-24). The release (R. 124) is set out in full in Appendix B of this brief. In the mutual release the Association released and discharged PSG and Greenberg from all claims against them, including the claim for the purchase price of the GARDENIA sugar. PSG and Greenberg released and discharged the Association from all claims against it, but reserved their rights as against one of the members of the Association, El Salto, S.A. The Association, however, did not reserve any rights against the Bank in the release. On the following Monday, October 30, the Association and PSG and Greenberg filed a stipulation and

order of dismissal with prejudice of all claims and counterclaims between them, again without a reservation of rights against the Bank (R. 102).

Although the attorneys for the Bank knew during the trial that the Association and PSG and Greenberg were contemplating a settlement of the claims between them other than the claim on the GARDENIA shipment (R. 129-30), neither the Bank nor its attorneys knew until after judgment was entered against the Bank that such settlement would be in the form of a mutual release which would include a release of the Association's claim against PSG and Greenberg for the purchase price of the GARDENIA sugar (R. 119, par. 4(c); R. 125-26). Having no knowledge of the Association's intended release of PSG and Greenberg from the GARDENIA claim, the Bank, of course, could not and did not consent to this release.

The Association filed a counter-affidavit to the motion in which it contended that it had not intended to release the Bank and that the only reason it entered into the release was because the Association would be unable to collect any judgment against Greenberg and PSG due to their insolvency (R. 128-31). The affidavit is silent with respect to the counterclaims against the Association, which were discharged by virtue of the mutual release.

The trial court heard oral argument on the motion, after which it denied the motion without evidentiary hearing, findings or opinion (R. 154, 135).

A. The Association's release of PSG and Greenberg from liability for the purchase price of the sugar, without an express reservation of rights against the Bank, discharged the Bank from any liability under the letter of credit.

1. *The relationship of the parties to a letter of credit transaction is a suretyship relation in the broad sense.*

In order to determine the effect on the Bank of the Association's release of PSG and Greenberg from any further liability to pay for the GARDENIA sugar, it is necessary to define the legal relationship of the parties. In a letter of credit transaction such as the present one, the buyer agrees to pay the seller the purchase price of the goods. At the buyer's request, the issuing bank through its letter of credit agrees to pay the seller a portion or all of the purchase price upon presentment of specified documents. The buyer in turn agrees to reimburse the issuing bank for any sums paid the seller under the letter of credit. Often, as in the instant case, the buyer is not required to pay the bank until the bank has paid the seller under the letter of credit (Ex. 202).

The net result is that the seller is the recipient of two separate promises to pay. From the seller's viewpoint, the principal debtor or the debtor to which the seller will first look is the issuing bank. The reason the seller looks to the bank first, of course, is that if the documents are in order the letter of credit calls for prompt payment. Should the issuing bank fail to make payment under the letter of credit, however,

the seller may nevertheless fall back to the contract of sale and pursue the buyer. Note, 40 Harv. L. Rev. 294 (1926). As between the issuing bank and the buyer, the ultimate liability must eventually rest with the buyer.

There can be no doubt that a letter of credit involves a suretyship relation as that term is used in the Restatement of the Law of Security. Section 82 of the Restatement defines "suretyship" as follows:

"Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." Restatement, Security § 82, at 228 (1941).

The above definition is broadly descriptive of the fact situation to which the rules of the Restatement apply.¹ Restatement, Security § 82, comment a, at 229 (1941).

A letter of credit transaction falls within the general definition of suretyship. Both the buyer and the issuing bank are under an obligation to the seller—the buyer through the contract of sale and the bank through the letter of credit. The mere fact that the ob-

¹ The Restatement notes that in some jurisdictions "suretyship" is used as a general term and "guaranty" is used to denote some particular type of surety contract. Other states, however, use "guaranty" as the general term and "suretyship" as the restricted term. Restatement, Security § 82, comment g, at 231-32 (1941). For purposes of the Restatement and this brief, "suretyship" is used as the general term.

ligations are contained in separate instruments or that the duties of the buyer and the bank are not co-extensive does not defeat the suretyship relation. Restatement, Security § 83(a) (1941); *id.* at § 82, comment f.

The seller is entitled to but one performance. He may not collect on the letter of credit and then seek the full purchase price from the buyer. Likewise, if the seller collects the purchase price from the buyer, the bank's obligation under the letter of credit is reduced. The principle that the seller is entitled to be paid for his product only once is codified in the Uniform Commercial Code, ORS 75.1150(1), which provides that the seller's damages against an issuer of a letter of credit must be reduced by any amount the seller realizes from the disposition of the goods. This was also the rule under pre-Code law. *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636, 640 (1925); 6 Michie, Banks and Banking 393 (1952).

As between the two promissors, it is essential that one of them, defined as the "principal," must bear the ultimate burden. The "surety" is the promisor who is entitled to be relieved by the principal. That the creditor may first look to the surety as being the primary obligor is of no consequence if the surety is entitled to pass the burden on to the other party:

"When the statement is made that the principal should perform, or that the principal has the principal or primary duty and the surety an accessory or a secondary duty, it does not mean

that the creditor's assertion of his right against the surety must be postponed until some action is taken against the principal. So far as the creditor is concerned, the surety may be the primary obligor.

* * * * *

"The one who should perform, the one who has the principal or primary obligation, in suretyship, is the one who, considering the situation as a whole, has the ultimate liability, or who would have the ultimate liability were it not for some defense, such as infancy, which is personal to himself." Restatement, Security § 82, comment f, at 229-30 (1941).

Thus, even though the seller first looks to the issuing bank for payment under the letter of credit, the bank is the surety and the buyer the principal because of the bank's right of reimbursement from the buyer.²

The authorities have recognized the suretyship element in a letter of credit transaction in which the seller has a right against both the issuing bank and the buyer, and the buyer has yet to pay the issuer the purchase price. Professor McCurdy has stated:

"If, however, the seller has a right to proceed against the buyer for the purchase price of the goods, there is between the bank and the buyer suretyship in its broad sense. Both are liable for the same debt. As between the buyer and the issuing bank the buyer should ultimately pay. The

² The contrary would be true where the buyer pays the purchase price to the bank prior to its issuance of the letter of credit, since the bank then does not have a right of reimbursement from the buyer.

bank is therefore principal, and the issuing bank is surety. But when the buyer pays the purchase price to the issuing bank the bank becomes principal and the buyer is surety. That the bank is not a guarantor, or surety in the narrow sense, is clear. Its obligation is primary and not secondary, even though the word *guaranty* is used." McCurdy, *Commercial Letters of Credit*, 35 Harv. L. Rev. 715, 737-38 (1922).

In *American Nat. Bank & Trust Co. v. Banco Nacional de Nicaragua*, 231 Ala. 600, 166 So. 8, 13 (1936), the court noted that a letter of credit is a written proposal to stand as surety or guarantor for the person named in the letter. In *Dunn v. McCoy*, 113 F.2d 587, 588-89 (3d Cir. 1940), the Third Circuit observed that letters of credit "are in essence only guaranties." In *Marshall-Wells Co. v. Tenney*, 118 Or. 373, 244 Pac. 84 (1926), the Oregon Supreme Court applied suretyship law to a nondocumentary letter of credit. See also *Timberlake v. J. R. Watkins Co.*, 209 N.E.2d 909 (Ind. App. Ct. 1965).

In the present case, since the Bank acted as surety and PSG as principal, the effect of the Association's release of PSG must be determined according to the law of suretyship.

2. *Under the law of suretyship, where the creditor releases the principal, the surety is discharged unless the surety consents to remain liable notwithstanding the release or unless the creditor in the release reserves his rights against the surety.*

Section 122 of the Restatement of the Law of Security states the law with respect to a creditor's release of a principal:

"Where the creditor releases a principal, the surety is discharged, unless

- (a) the surety consents to remain liable notwithstanding the release, or
- (b) the creditor in the release reserves his rights against the surety."

To permit the creditor to proceed against the surety after having given the principal a complete release of the underlying obligation would defeat the purpose of the release, since the surety would then seek reimbursement from the principal. Moreover, the creditor is entitled to but one performance. Having received an agreed satisfaction of that performance by the principal, he cannot seek double performance from the surety as well. *Cf.*, *Reid v. Kier*, 175 Or. 192, 211-12, 152 P.2d 417, 424-25 (1944); *Hanson v. Bellman*, 161 Or. 373, 384-85, 88 P.2d 295, 300 (1939).

3. *An intent not to release the surety is not effective to prevent the surety's discharge unless the reservation is contained in the instrument of release.*

In its affidavit the Association contended that the sole reason for its release of PSG and Greenberg was the fact of their insolvency (R. 130-31). Thus, even though it did not reserve its rights against the Bank in the release or the Stipulation of Dismissal, the Association contends that it did not intend to release the Bank.

Even assuming the accuracy of these contentions, the Association's mental reservation did not preserve its rights against the Bank. "The reservation of right is ineffective unless it is contained in the instrument of release." Simpson, Suretyship 304 (1950); accord, Restatement, Security § 122(b) (1941).

In *Bafico v. Southern Pacific Co.*, 364 F.2d 36 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025, 87 Sup. Ct. 743, 17 L. Ed. 2d 673 (1967), this Court stated the Oregon law with respect to uncommunicated mental reservations:

"* * * Here appellant was represented at all times, including the negotiation for settlement and signing of the release, by his own attorney, not by a layman. We think that in these circumstances, the trial court could properly infer that appellant knew what he was doing when he signed the release and could properly hold him bound by the literal, precise, unambiguous terms of the contract he signed. It follows that no investigation into his uncommunicated intent at the time of signing was required, for 'the law in this jurisdiction [Oregon] does not permit contracts to be reformed merely because of uncommunicated mental reservations held by one of the parties at the time of execution.' *Wheeler v. White Rock Bottling Co.*, 1961, 229 Ore. 360, 366 P.2d 527, 529." 364 F.2d at 38.

The case of *Gunnell Construction Co., Inc. v. Hartford Accident and Indemnity Company*, 374 F.2d 278 (D.C. Cir. 1966), involved three parties, a prime contractor, a subcontractor, and the sub-contractor's sur-

ety. When the subcontractor failed to complete the work under the subcontract, a dispute arose as to whether the prime contractor or the subcontractor was in breach. The subcontractor filed an action against the contractor in the District Court for the District of Columbia; the contractor answered, claiming that it was the subcontractor who breached the contract. Meanwhile, the subcontractor filed a petition in bankruptcy; the contractor filed claims against the bankrupt estate based upon the alleged breach of contract and other matters.

The bankrupt estate of the subcontractor reached a compromise with the contractor in which the compromise agreement expressly reserved the contractor's rights against the subcontractor's surety. The contractor and subcontractor then filed a stipulation of dismissal in the district court action dismissing all claims, setoffs and counterclaims, but not expressly reserving the contractor's rights against the surety.

When the contractor brought action against the subcontractor's surety, the district court granted summary judgment against the contractor. The D. C. Circuit affirmed, holding that despite the reservation of rights in the compromise agreement, the stipulation of dismissal without reservation discharged the surety. The dissenting judge was of the opinion that the surety was not discharged because of the express reservation of rights in the compromise agreement.

In the present case, the Association not only failed to reserve its rights against the Bank in the Stipula-

tion of Dismissal, but also failed to reserve its rights in the instrument of release.

B. The mutual release constituted an agreed satisfaction of PSG's underlying liability for the purchase price of the GARDENIA sugar and must be taken in mitigation of the Association's damages on the breach of the letter of credit.

Even if the parties were not in a suretyship relation, the Bank's obligation to the Association has been satisfied by the Association's mitigation of its damages. The Association is entitled to but one payment for the GARDENIA sugar. Having reached an accord and satisfaction with PSG and Greenberg for the purchase price of the sugar, the Association by this satisfaction has received payment for the sugar and may not have an additional satisfaction from the Bank.

Since the Association is entitled to be paid only once for its sugar, it follows that anything the Association realizes from the sale or disposition of the sugar, even if from a third party, mitigates the Association's damages from the Bank's failure to honor the letter of credit. ORS 75.1150(1) provides:

"Remedy for improper dishonor or anticipatory repudiation. (1) When an issuer wrongfully dishonors a draft or demand for payment presented under a credit the person entitled to honor has with respect to any documents the rights of a person in the position of a seller as provided in ORS 72.7070 and may recover from the issuer the face amount of the draft or demand together with incidental damages under ORS 72.7100 on seller's incidental damages and interest *but less any*

amount realized by resale or other use or disposition of the subject matter of the transaction. In the event no resale or other utilization is made the documents, goods or other subject matter involved in the transaction must be turned over to the issuer on payment of judgment." (Emphasis added)

In *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925), the court stated with respect to a bank's wrongful refusal to make payment under a letter of credit covering a shipment of paper:

"The plaintiff's damages were, primarily, the face amount of the drafts. Plaintiff, of course, was bound to minimize such damage so far as it reasonably could. This it undertook to do by reselling the paper, and for the amount received, less expenses connected with the sale, it was bound to give the defendant credit." 146 N.E. at 640; accord, 6 Michie, Banks and Banking 393 (1952).

The Association has disposed of the sugar. PSG received the GARDENIA sugar from the Association and resold it to a New York buyer. Prior to executing the release, PSG had admitted that it owed the Association \$244,730.32 for the sugar, but had been withholding payment to offset PSG's other claims against the Association (R. 62-63; R. 74, par. 15; R. 77, par. 4).

The Association, however, has now released PSG from its admitted liability to pay for the GARDENIA

sugar. In return for being relieved of paying the Association for the sugar and for being released from the other claims the Association had asserted against them, PSG and Greenberg released the Association from their counterclaims totalling \$1,265,423.

The Association's claim that PSG and Greenberg were insolvent at the time the release was signed, that PSG and Greenberg made no payment to the Association for the release, and that the only incentive for the Association's giving the release was the saving of costs of litigation (R. 130-31), is untenable. Prior to signing the release, PSG's and Greenberg's assets included over \$1,200,000 in claims against the Association. These claims were a potential source from which they could have paid the Association (by way of setoff) the remainder of the purchase price of the GARDENIA sugar; or if the Bank paid the Association under the letter of credit, these claims could have provided PSG and Greenberg with the funds with which to reimburse the Bank. Instead, the Association took these claims as an agreed satisfaction of the Association's claims against PSG and Greenberg, including the claim for the purchase price of the sugar.

In *Hanson v. Bellman*, 161 Or. 373, 88 P.2d 295 (1939), plaintiff's predecessor had a claim against a bank as his escrow agent for the wrongful delivery of a deed and a claim against the holder of the deed in order to cancel it. He filed an action against the bank, but took a voluntary nonsuit. He then reached an accord and satisfaction with the bank in which he gave

the bank a full release and the bank released him from the judgment against him for costs. When the plaintiff brought suit for cancellation of the deed, the court held:

“The record shows without question that about eighteen months after these transactions, after Knerr’s election to recover from his delinquent agent, the bank, he had a settlement with the bank and reached an accord and satisfaction and gave the bank a release of all claim. He thus, with full knowledge of the facts and with the express approval of the attorney, the present plaintiff received and accepted a full satisfaction for the alleged injury done him. Having done so, he is precluded from recovering the property for which he has been paid by this satisfaction and is precluded from recovering from these defendants.” 161 Or. at 384, 88 P.2d at 300.

In *Reid v. Kier*, 175 Or. 192, 152 P.2d 417 (1944), a creditor beneficiary had a right to maintain an action against both the promisor and the promisee of a third party beneficiary contract, but was entitled to but a single satisfaction. The beneficiary executed a release in favor of the promisor and then brought action against the promisee. The court held that since there could be but one satisfaction, the release of the promisor discharged the promisee. 175 Or. at 211-12, 152 P.2d at 424-25.

In *Perry v. Oliver*, 317 Mass. 538, 59 N.E.2d 192 (1945) a person made a loan to a husband and wife, and later filed an action against the husband and wife

to recover the amount of the loan. While the action was pending, the wife gave the creditor a note and mortgage to secure the loan. The husband filed a declaration in setoff alleging that the creditor owed him money. Without the wife's knowledge, the creditor and the husband agreed to extinguish the claims they had against each other. The creditor then took steps to foreclose the wife's mortgage. In cancelling the mortgage, the court stated:

"The reason for this rule is plain. Although there are several obligors there is but one debt; therefore the satisfaction of the debt, or of a judgment against one for it, necessarily discharges all." 59 N.E.2d at 193.

The Association has received full satisfaction for the purchase price of the sugar. The Bank is entitled to apply that satisfaction in mitigation of the damages claimed by the Association.

II

The finding that the August 26, 1966 cable was a misrepresentation voiding the Association's reduction of its first draft cannot be sustained since the sugar at all times polarized below the minimum fixed in the letter of credit.

The factual context in which the August 26, 1966 cable was sent is clearly set forth in the record and has been described earlier in this brief in the Statement of the Case. In summary, the cable in controversy was an outgrowth of negotiations between the Association and Greenberg after initial polarization tests disclosed that the GARDENIA sugar was polarizing

as much as 2.7° below the 96° minimum fixed in the letter of credit. The Association was first informed by cable that initial polarization tests of the GARDE-NIA sugar were running between 93° and 95° (Tr. 207, 208). Greenberg discussed the test results with the Association's manager by telephone on August 26, 1966, and advised the manager that his buyer sought substantial adjustments in purchase price to compensate for deficiencies in the sugar (Tr. 207-209).

On the same day, Greenberg informed the Bank that the Association had agreed to reduction of its first draft to 75 percent of invoice value and requested that the Bank cable Banco del Agro, the Association's bank in Guatemala, in order to obtain confirmation of the proposed reduction by the Association and by its bank (Tr. 84, 95, 96). The cable stated:

"174 REFERENCE OUR LETTER CREDIT 11561 POLARIZATION BELOW CREDIT REQUIREMENT ASAZGUA [the Association] WILL AUTHORIZE DRAFT COVERING 2917 LONG TONS AT 75 PERCENT INVOICE VALUE PLEASE OBTAIN THEIR APPROVAL AND CABLE US URGENTLY TODAY NECESSARY AUTHORITY TO ALTER DRAFT TO 75 PERCENT INVOICE VALUE ADVISE US CORRECTED DRAFT AMOUNT.

UNITBANK." (Ex. 54).

The cable was received in Guatemala on Saturday, August 27, and a representative of Banco del Agro delivered a copy to the president of the Association, who approved reduction of the draft to 75 percent

of invoice value (Tr. 239). By cable dated August 28, 1966, and by letter dated August 31, 1966, Banco del Agro confirmed to the Bank on behalf of the Association the reduction of the first draft (Exs. 212, 58).

The sole basis assigned by the trial court for the liability of the Bank upon the first draft lies in its finding that the cable of August 26, 1966 misrepresented the quality of the GARDENIA sugar to the Association, thereby vitiating the Association's consent to the reduction of the first draft.

For purposes of this appeal the Bank will accept the court's finding that the August 26 cable was a material representation as to the quality of the GARDENIA sugar and that the Association relied upon that representation in authorizing the reduction of the first draft to 75 percent of invoice value. The Bank cannot, however, accept, nor can it find any support for the court's finding that the representation contained in that cable was false and constituted a misrepresentation.

The only representation in the cable is "POLARIZATION BELOW CREDIT REQUIREMENT." In terms of the language of the cable, the applicable law, and the interchangeable usage of "credit" and "letter of credit" by the parties, that statement can only refer to the 96° minimum polarization set forth in letter of credit No. 11561. "Credit" and "letter of credit" are identically defined under ORS 75.1030(a) (UCC 5-103) and are used interchangeably throughout that chapter. The identity of meaning of the two

terms as established under applicable law becomes a part of the parties' contract as if set forth therein. *Giustina v. United States*, 190 F. Supp. 303 (D. Or. 1960); *United States Fidelity & Guaranty Company v. Long*, 214 F. Supp. 307 (D. Or. 1963). A review of letter of credit 11561 and the Uniform Customs and Practice for Documentary Credits incorporated therein discloses that the two terms are used interchangeably throughout those documents (Exs. 201, 203).

The cable itself first identifies the letter of credit by number and only then represents that the polarization is below the "credit requirement." Finally, the Association stipulated in the Pretrial Order herein that the August 26th cable reported that "sugar polarization was below credit requirements of letter of credit No. 11561." (R. 73, par. 11). In view of the parties' agreement that the cable reference to "credit requirement" was a reference to letter of credit 11561, the only applicable standard by which to judge the truth of that cable is the 96° minimum polarization standard of that credit.

Obviously a statement, in order to constitute a misrepresentation enabling a party to avoid his contractual obligations, must be not only material and relied upon, but also false. While authorities may vary as to the degree of reliance and materiality required, untruth of the statement in question is basic to the definition of misrepresentation and to relief therefor. The Restatement of Contracts defines misrepresentation in the following terms:

“Misrepresentation * * * means any manifestation by words or other conduct by one person to another that, under the circumstances, *amounts to an assertion not in accordance with the facts.*” (Emphasis supplied.) Restatement, Contracts § 470 at 890, 891 (1932).

Since by agreement of the parties the cable represented that the sugar polarized below the standard of letter of credit 11561, the truth or falsity of that cable and validity of the court's finding of misrepresentation must be judged in terms of the 96° standard fixed by the credit.

Although the Bank, prior to sending its cable, did not have independent confirmation of Greenberg's representations regarding the polarization of the sugar, those representations were confirmed by the test results issued by the Lewis Loper Waldo Laboratory on the day of the cable. The first five test samples of the GARDENIA sugar polarized respectively at 93.3, 93.9, 95.6, 95.4 and 95.7 degrees (Ex. 224). In all, some 14 samples were taken of the GARDENIA sugar as it was unloaded at approximately 700,000 lb. intervals. Those 14 samples were tested by three separate laboratories, with the test samples varying from 93.25° polarization to 96.3° polarization. Only one of the 14 samples tested at or above the 96° level fixed in the credit, and the average polarization of the GARDENIA sugar was 95.176358°. (Test results collected in Ex. 23.)

Unfortunately, the trial court did not specify the

standard against which it judged the cable to be a misrepresentation. It is evident, however, in the light of the facts, that the court used some standard other than 96° . The Association's manager testified that he believed that the cable meant that the sugar was polarizing below 94° , and the court may have adopted that belief as its standard. There is nothing, however, in the cable, the letter of credit, or the parties' usage of the term "credit requirement" which would support that construction. Reference to a standard of 94° is particularly anomolous in view of the parties' specific pretrial agreement that the cable reported polarization below the requirements of letter of credit 11561. Since the only polarization standard specified in the credit was 96° and since the sugar never, in fact, polarized at that level, there can be no basis for the court's finding that the statement "polarization below credit requirement" was false.

While the Association may have mistakenly interpreted the cable upon receipt and acted on the basis of that mistake, such mistake cannot form a basis for the court's finding of a misrepresentation on the part of the Bank. There is nothing in the record to indicate that the Bank knew that the Association might misconstrue its cable advice. The Bank's representations were limited in scope to the requirement set forth in its letter of credit and phrased in language which could only refer to the standard in its credit. Having received payment on its reduced draft, the Association cannot now seek additional payment on the ground that it was mistaken in consenting to the reduction.

CONCLUSION

The defendant Bank respectfully urges that the trial court erred in denying defendant's post-trial motion. The judgment should be reversed and the case remanded with the direction that the trial court either amend its findings and judgment to show that plaintiff has suffered no damage, or relieve defendant from the judgment on the ground that the judgment has been satisfied, released or discharged. In the event this court should determine that the post-trial motion was properly denied, defendant respectfully urges that the trial court erred in finding that defendant induced plaintiff to consent to the reduction of the first draft through misrepresentation. Accordingly, the judgment should be reversed and remanded with the direction that the trial court reduce the judgment by the difference between 90 percent and 75 percent of invoice value on the first draft—that is, the judgment should be reduced by \$55,866.38, and the interest which was assessed thereon.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD M. FEUERSTEIN
Of Attorneys for Appellant

APPENDIX A

Page references to the record where exhibits were identified, offered and received are as follows:

Exhibit Number	Identified	Offered and Received
Plaintiff's		
1-103	58	58
104	180	180
Defendant's		
201-234	58	58
236	199	200
237	197	197
238	199	200

APPENDIX B**FULL AND FINAL RELEASE OF ALL CLAIMS**

WHEREAS Asociacion de Azucareros de Guatemala has instituted action in the United States District Court for the District of Oregon entitled "Asociacion de Azucareros de Guatemala, 4a. Av. 14-53 (1), Guatemala City, Guatemala, Plaintiff, v. Philip S. Greenberg, 607 Executive Building, Portland, Oregon 97204, PSG Co., 607 Executive Building, Portland, Oregon 97204, The United States National Bank of Oregon, Portland, Oregon, Defendants," Clerk's No. 66-580, wherein said Asociacion de Azucareros de Guatemala claims certain payments on shipments, agency commissions, lost profits and other damages from said PSG Co. and Philip S. Greenberg, and

WHEREAS PSG Co., in said action, has asserted counterclaims against the Asociacion de Azucareros de Guatemala for damages resulting from alleged breach of certain contracts,

NOW, THEREFORE, in consideration of the mutual agreements herein contained, Asociacion de Azucareros de Guatemala releases and discharges PSG Co. and Philip S. Greenberg, and Philip S. Greenberg and PSG Co. release and discharge Asociacion de Azucareros de Guatemala, its members, except El Salto, S.A., its officers and employees of and from any and all claims, demands, actions or causes of action whatsoever, of any kind or nature, known or unknown, suspected or unsuspected, which the undersigned, or any of them, may have at the date hereof.

IN WITNESS WHEREOF the parties hereto
have caused these presents to be executed this ——
day of —————, 1967.

ASOCIACION de AZUCAREROS de
GUATEMALA

By J. C. BELLAMY

John C. Bellamy, Manager

PSG CO.

By PHILIP S. GREENBERG

Philip S. Greenberg, President

PHILIP S. GREENBERG

Philip S. Greenberg

APPENDIX C

APPLICABLE PROVISIONS OF FEDERAL
RULES OF CIVIL PROCEDURE

Rule 52. Findings By The Court.

“(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.
* * *”

Rule 59. New Trials; Amendment Of Judgments

“(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

* * * * *

“(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment.”

Rule 60. Relief from Judgment Or Order

“(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *"

No. 22693

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES NATIONAL BANK OF
OREGON, PORTLAND, OREGON,

Appellant,

v.

ASOCIACION de AZUCAREROS de
GUATEMALA 4a. Av. 14-53(1)
GUATEMALA CITY, GUATEMALA,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable Robert C. Belloni, Judge

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FILED

SEP 13 1968

WM. B. LUCK, CLERK

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Appeal from the United States District Court
for the District of Oregon

Honorable Robert C. Belloni, Judge

STATEMENT OF ISSUES

1. Is there evidence to support the District Court finding that the Bank's cable of August 26, 1966, was false?

2. Is the issuer of a commercial letter of credit discharged from its obligation when the beneficiary, after obtaining judgment against the issuer on the letter of credit, releases other claims against the issuer's insolvent customer?

SUPPLEMENTARY STATEMENT OF FACTS

On June 7, 1966, the United States National Bank of Oregon (hereafter the Bank) issued its Irrevocable Commercial Letter of Credit No. 11561 to the Asociacion de Azucareros de Guatemala (hereafter the Association). By this Letter of Credit, the Bank agreed to pay 95 percent of invoice value upon presentation of documents evidencing August shipment by the Association of:

"'5,000 Long Tons, ... more or less, Guatemala Bulk Raw Centrifugal Sugar of the 1965/66 crop, F.O.B. Stowed Guatemalan Port, basis 96 degrees minimum polarization'."
(R. 104, 71)

The Bank's Letter of Credit was not an instrument of guarantee or surety. It was a typical irrevocable commercial letter of credit--a primary promise to pay the shipper on presentation of documents showing goods had been shipped. It contained no reservations. It was not conditioned on the failure of the consignee to pay for the sugar.

On August 15, 1966, the Association shipped the sugar on the SS Gardenia, and immediately dispatched the shipping documents to the Bank. The Bank received the shipping documents on August 22 (R. 72). Its obligation to pay was then fixed.

The Bank had previously received a back-to-back letter of credit from Schroder & Co., acting for the ultimate purchaser of the sugar, by which Schroder promised to pay the Bank for the sugar when the Bank forwarded the shipping documents to Schroder (Ex. 19). Accordingly, when the Bank received the documents from the Association, it forwarded copies to Schroder & Co., and received full payment

from Schroder & Co., on August 26, 1966, in the amount of \$548,366.45 (R. 72).

The sugar was unloaded at Gramercy, Louisiana, between August 22 and August 24, 1966 (R. 72). On August 26, the consignee of the sugar, Philip S. Greenberg and PSG Co. (hereafter Greenberg), falsely advised the Bank that the sugar was defective and asked the Bank to send the Association a cable over the Bank's signature stating "polarization below credit requirement." Without varifying this profoundly important representation, the Bank sent such a cable, and in it, also at Greenberg's instigation, asked the Association on that account to agree to an amendment to the letter of credit reducing the Bank's obligation to 75 percent of the invoice value of a portion of the sugar (R. 73). (The Court below found that the Bank's cable was false and misleading (R. 107).) The Bank did not advise the Association that Schroder had already paid. The Association, relying on the

Bank's misstatement, agreed to this first amendment of the letter of credit (R. 107). The Bank then paid the Association \$279,331.92, representing 75 percent of the invoice value of the first portion of the shipment (R. 73).

Then, on September 14--again at Greenberg's urging and again with no attempt to verify what he said--the Bank sent a second cable which again falsely reported that the sugar was deficient and again requested a reduction of the Bank's obligation under the Letter of Credit to 75 percent of the remaining portion of the shipment--less "charges" to be incurred by PSG. Again the Bank failed to tell the Association that Schroder had paid in full on the Schroder letter of credit. This time, the Association rejected the proposed amendment to the Letter of Credit (R. 108). (The Court below found that this Bank cable was also false and misleading (R. 108).)

By this time, the Bank had received payment of \$548,366.45 from Schroder & Co. It

had paid the Association only \$279,331.92. It kept \$75,000.00 to apply against a debt owed by Greenberg to the Bank, and turned the rest of the Schroder money over to Greenberg. Greenberg was by then in dire financial straits--as the Bank well knew--and quickly used the Schroder money to pay other debts.

Thus, by September 27, the proceeds from the sale of the sugar had been dissipated. The Bank was apparently intent on not paying the Association--even though it had received the shipping documents a month earlier--until it was certain it would be paid by Greenberg. Greenberg was unable to pay. So instead, on that day, he told the Bank that he had expended \$132,827.91 in gaining admission of the sugar into the United States--again, a falsehood--and therefore that the Bank only owed the Association \$7,508.37 (R. 108). The Bank made no independent investigation of the non-existent entry charges and instead embraced

the fiction and so advised the Association. (Bank counsel later admitted the Bank's claim of entry charges was false (R. 74) and the Court below so found (R. 108).) The Bank then tendered \$7,508.37 in final payment for the sugar. The Association refused and, on December 14, 1966, sued both the Bank and Greenberg (R. 1).

The Association's complaint as to the Bank sought recovery solely on account of the Bank's failure to pay some \$250,000 still due under its Irrevocable Commercial Letter of Credit on the Gardenia shipment (R. 4-6). The complaint as to Greenberg, on the other hand, was for recovery of money still owing on an earlier sugar shipment on the SS Ojeda (R. 3-4) for approximately \$150,000 of agency commissions because of Greenberg's various breaches of his fiduciary duties as agent for the Association (R. 6-7), for his personal profits on a variety of other transactions (R. 7-8), and for his violation of the

Robinson-Patman Act (R. 8-9)--in addition to a claim that Greenberg was secondarily liable for the purchase price of the Gardenia sugar shipment (R. 4-6). Greenberg counter-claimed against the Association for a variety of matters also unrelated to the Gardenia shipment (R. 42-45).

At plaintiff's request, therefore, the Court ordered that the Association's case against the Bank be tried first (R. 129). Plaintiff's counsel advised the Court at the Pretrial Conference that a preliminary determination of the Bank's liability was appropriate because it might avoid a useless trial of the Greenberg case. Bank counsel interposed no objection (R. 129) and made no claim that a settlement with Greenberg would discharge the Bank. Instead, the Bank entered into a companion stipulation with Greenberg for the entry of judgment against him for any amount the Association recovered from the Bank (Ibid).

At the trial, the Bank made various contentions, including the contentions

-- that it was entitled to deduct the nonexistent entry "charges," as to which the court determined that "Those purported charges were fictitious and the Bank had no authority to deduct them from the draft" (Tr. 308-309); and

-- that the shipping documents were inadequate, a theory the Court characterized as "clearly an afterthought," and part of a "desperate effort to extricate themselves from their predicament" (Tr. 309).

The Court concluded that (Tr. 310):

"The most charitable statement I can make about the Bank's accepting Greenberg's various statements and representations is that it was gross negligence."

The Court therefore held, prior to any determination of the claims between Greenberg and the Association, that the Bank was liable to the Association on its Irrevocable Commercial Letter of Credit. The opinion giving judgment

in favor of plaintiff was announced on Friday, October 27, 1967 (Tr. 305-312).

In the course of the trial against the Bank, counsel for Greenberg and the Association agreed that a trial involving the independent issues between Greenberg and the Association would be fruitless. Greenberg had no assets, and his counter-claims were asserted apparently only for defensive purposes. The Gardenia question would, it appeared, be settled in the proceeding against the Bank. Accordingly, Greenberg and the Association agreed not to go forward with that second trial, which would for all practical purposes have involved issues in which the Bank had no interest in any event. This was to avoid a wasteful expenditure of the time of the Court, the attorneys and the witnesses. Neither Greenberg nor the Association had any notion that they could affect the Bank, or limit its liability to the Association on the Gardenia Letter of Credit, in this way.

At the time, the Bank was apparently of the same view. The arrangement was brought to the attention of the trial judge in a conference in chambers (R. 129). Bank counsel attended and was fully advised of the proposal not to pursue the claims against Greenberg. He entered no objection (R. 129-130). And he made no suggestion that such a settlement with Greenberg could also wipe out the Association's claim against the Bank--which was at that very moment in mid-trial.

After the Court announced its decision to enter judgment against the Bank on the Gardenia Letter of Credit on Friday, October 27, 1967, the Court Clerk advised counsel that either the Greenberg issues be formally settled and dismissed by the following Monday morning, October 30, 1967, or Greenberg and the Association would go to trial on those issues that day (R. 130). At this point, the Gardenia issues were, for all practical purposes, determined as a result of the decision in the Bank trial; also at this

point, a trial against Greenberg had even less to commend it than before. Accordingly, a mutual release was prepared and executed October 28, 1967, and a stipulation of dismissal of the issues between the Association and PSG Co. and Philip S. Greenberg filed on October 30, 1967 (R. 132, 102).

As the later Affidavit of counsel to the Association stated (R. 130-131):

"The Asociacion entered into such release only because it knew at the time of the release that Greenberg had a judgment against him in the amount of the Asociacion's judgment against the Bank and the costs of future litigation could thereby not be justified. The only incentive for the Asociacion's release of the remaining claims against Greenberg was the fact of his insolvency."
(R. 130-131)

After judgment was entered against the Bank (R. 113), the Bank moved to set aside the judgment on the theory that the Association's release of Greenberg in fact also released the Bank (R. 117). The Court heard argument, considered affidavits of counsel (R. 122, 125, 128) and denied the motion (R. 135).

ARGUMENT

I. There was ample evidence to support the District Court's determination that the Bank's cable of August 26 was false.

The Bank challenges the actual result of the trial below on only one ground. It contends that its cable to the Association of August 26, 1966--"polarization below credit requirement"--was not in fact false.

There was ample evidence to support the determination of the trial judge. The sugar was not below the "credit requirement" of the Letter of Credit. As the Court said (Tr. 311):

"The Bank, or at least Mr. Cornell, did not then understand, nor does it now understand the meaning of the /the trade term in the Letter of Credit/ basis ninety-six degrees minimum polarization."

The accepted trade meaning of the Letter of Credit provision was carefully explained by Mr. Bellamy, the experienced Manager of the Sugar Association, as follows:

"Q Now, you will recall, Mr. Bellamy, that the Bill of Lading -- excuse me, the Letter of Credit in this case contains the words '96 degrees polarization'. Would you explain briefly the significance

of 96 degrees polarization as a standard in international sugar -- in sugar transactions with the United States?

"A Well, the actual meaning of 96 polarization is a reference to the purity or the polarity of the sugar; and it's recognized practically the world over in the sugar trade. * * * Raw sugar, as referred to in the sugar trade internationally, is defined that it must be sugar that would polarize between 94 and not above 98. Anything that polarizes between those two figures is recognized as raw sugar. * * *

"Q Now, what is the custom and practice in the trade with respect to payment between buyer and seller based on polarization? May I refer you, Mr. Bellamy, to Plaintiff's Exhibit No. 100, and specifically page 315 thereof, subparagraph 3, the bottom of that page, which is Chapter 7 of the By-Laws of the New York Coffee and Sugar Exchange. And I refer you to the system of premiums and penalties set out at the beginning of page 315 and going over to 316.

"My question, Mr. Bellamy, is, does this system of premiums and penalties, premiums paid to the seller of the sugar that eventually polarizes above 96 degrees, penalties -- that is to say deductions if the sugar polarizes less than 96 degrees, represent the standard custom and practice in the industry?

"A Yes, this is the standard that is used. The same one that is used on this page.

"Q Yes.

"A If it polarizes above the premium -- if it polarizes above, those are the penalties.

"Q And 96 degrees is the bench mark?

"A Yes, that is the recognized basis.

"Q But raw sugar is sold anywhere from 94 to 98 degrees?

"A Yes."

(Tr. 170-172)

"THE COURT: Mr. Bellamy, what is meant by the words in the letter of credit 'Basis 96 degrees minimum polarization'?

"THE WITNESS: Well, that is generally referred to as the basis for the price; that the price that is mentioned in the contract or in the letter of credit where it says -- in this case I think it was \$5.70 per hundred pounds F.O.B. It meant that it would be \$5.70 for sugar polarizing 96 degrees. And any polarization above or any polarization below would bear the penalties or the premium according to that basis.

"THE COURT: Does the word 'minimum' have any significance that you can think of? 'Basis 96 degrees minimum polarization'.

"THE WITNESS: No, not especially to me. I mean I don't recollect whether on the other contracts that has been mentioned at all.

"THE COURT: 'Basis 96 degrees polarization' would mean the same thing to you then as 'Basis 96 degrees minimum ----'

"THE WITNESS: Yes.

"THE COURT: '---polarization'?

"THE WITNESS: Yes, I would have read it as that."

(Tr. 217-218)

In short, as the word "basis" suggests, 96° is the bench mark from which the system of premiums and penalties is applied to calculate the final purchase price on all sugar sales. Thus, to the Association, as to anyone else in the sugar industry, the Bank's cable meant that the sugar was not polarizing within the $94-98^{\circ}$ range. Since the sugar polarized at 95.176358° (Ex. 49), the cable was false.

The only polarization "requirement" of the letter of credit, the breach of which would call for the large price reduction requested by the Bank, is contained in the requirement that the product be "raw sugar"--i.e. polarize at 94° or above. The sugar met this requirement.

The Bank, which in the words of the District Court "did not then understand, nor does it now understand the meaning of the [Term] basis ninety-six degrees minimum polarization," offered no evidence rebutting

the trade meaning of the cable. And this meaning must govern; the Association, a member of the trade, relied upon the statement (R. 107, 108). Letters of credit are to be construed in accordance with the customs of the trade--and against the writer. See Fair Pavilions, Inc. v. First National City Bank, 24 App. Div. 2d 109, 264 NYS 2d 255 (1965), rev'd on other grounds, 19 NY 2d 512, 281 NYS 2d 23 (1967)

The lower court's finding that the cable was false is fully supported by the evidence.

II. The Bank is not relieved of its obligation to the Association by virtue of the Association's post-trial settlement with Greenberg.

Actually the Bank's primary point here is unrelated to the trial result. The Bank does not contest either the District Judge's determination that it was grossly negligent in passing Greenberg's falsehoods on to the Association over its own signature (Tr. 310), or the Court's conclusion that the Bank's quarrel with the shipping documents was "an afterthought" (Tr. 309), or the finding that

the entry charges claimed by the Bank were "fictitious" (ibid). Instead, the Bank argues that, even if it should have paid the Gardenia Letter of Credit in full at the time, as the Court below held, it was later relieved of its liability because, after the Court had ruled, the Association settled its claims--largely unrelated to the Gardenia transaction--with the bankrupt Greenberg in order to avoid a useless trial.

A. A letter of credit is not a suretyship.

1. The Bank first suggests that a letter of credit is a suretyship. This is not the law. The official comments to the Uniform Commercial Code (which has been adopted in Oregon) make this quite clear (UCC § 5-103, Uniform Code Comment 3; ORS 75.1030):

"The issuer is not a guarantor of the performance of these underlying transactions."

UCC § 5-101, Comment, labels the "occasional ***

excursions into the law of guaranty" as a source of letter of credit law as "unfortunate."¹

The differences between suretyship and a letter of credit relationship are many and obvious. In Oregon, a surety is one who "promises to protect the promisee only in case a third party, who is primarily liable on the obligation, fails to perform." The creditor seeks recovery from the surety "only in the event of default by the principal debtor."

Atterbury v. Carpenter, 321 F.2d 921, 923-924 (9th Cir. 1963).

The issuer of a letter of credit, on the other hand, undertakes a primary obligation. He agrees to pay on presentation of the shipping documents, long before the buyer even receives the goods. The buyer's refusal to pay, or the

¹ Because of the disadvantages of a guaranty theory, including the "danger of releasing parties secondarily liable in the course of dealings with the principal debtor," Hershey, Letters of Credit, 32 Harv. L. Rev. 1, 14 (1918), long ago concluded that "the value of letters of credit would be seriously impaired if a guaranty theory were to be adhered to...."

seller's inability to collect from the buyer, is not a condition precedent to the issuer's liability. The issuer is not concerned with the state of affairs between the buyer and the seller. He is bound to honor his promise "regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." UCC § 5-114(1); ORS 75.1140(1).²

This rule works both ways--as a protection to letter of credit issuers, and as the measure of their obligations. If it

² The letter of credit constitutes the sole contract with the shipper, and "the bank issuing the letter of credit has no concern with any question which may arise between the vendor and the vendee of the merchandise for the purchase price for which the letter of credit was issued." Lamborn v. Lake Shore Banking & Trust Co., 196 App. Div. 504, 506, 188 NYS 162, 163, aff'd 231 N.Y. 616, 132 N.E. 911 (1921).

See also American Steel Co. v. Irving National Bank, 266 F. 41 (2d Cir. 1920); Bank of East Asia v. Pang, 140 Wash. 603, 249 P. 1060 (1926); and cases collected and discussed in McCurdy, Commercial Letters of Credit, 35 Harv. L. Rev. 715, 724-730 (1922).

were otherwise, and if the issuer's liability turned on the underlying state of affairs between the buyer and seller, letters of credit could not safely be paid until the goods were delivered. No bank would accept the risk of paying against documents. There would be precious little letter of credit financing, if this were the law.

A surety, on the other hand, is not liable unless and until his principal is liable and defaults. Thus, the principal's defenses--and the release of the principal--are available to the surety. See 10 Williston, Contracts, § 1214, at 714 (Ed. W. Jaiger 1967). By contrast, in letter of credit law, where the documentary conditions of the letter of credit are met, the Bank may pay--and must pay. It is not obliged to, and may not, go behind the documents and refuse payment, for instance, on the ground that the goods are defective. Whether the buyer is liable on the goods is of no moment to the Bank. See Kingdom of Sweden v. New York Trust Co.,

197 Misc. 431, 96 NYS 2d 779 (Sup. Ct. 1949).

The issuer buys documents--not goods.

In fact, the Bank's Assistant Vice President, Mr. Sirianni, claimed that this was the Bank's own view of the matter (Tr. 56):

"Q ... In this situation where you are using a Letter of Credit, what role does the actual commodity play?

"A The commodity to the Letter of Credit plays very little role. The documentation is the more important thing.

"Q In other words, do you make any check of the commodity--if the documents are in proper form, do you make any attempt to ascertain whether or not the commodity is satisfactory?

"A Not at all.

"Q To illustrate a situation, could the documentation call for the sugar of a certain polarization, and if the documents are in a proper form, you would pay?

"A Yes.

"Q And the shipment could actually turn out to be flour or salt or something like that?

"A Yes."

Thus, to address ourselves to this specific case, a release between buyer and seller will also release a surety. But such

modification of the underlying transaction can have no such effect on the rights and obligations of an issuer of a letter of credit. In Dulien Steel Prods., Inc., v. Bankers Trust Co., 189 F. Supp. 922 (S.D.N.Y. 1960), aff'd 298 F.2d 836 (2d Cir. 1962), for example, the defendant bank had confirmed a letter of credit, to pay a commission. The letter of credit called for payment by the bank against documents. After the credit was issued, the customer and a party related to the beneficiary agreed to reduce the amount of commissions. The documents were presented and paid, nonetheless. The question was whether or not the customer was liable to the bank. The court held for the bank, stating:

"When a bank confirms a letter of credit the letter evidences its irrevocable obligation to honor the drafts presented by the beneficiary upon compliance with the terms of the credit. The letter is quite independent of the primary agreement between the party for whose account it is issued and the beneficiary, or of any underlying transactions. Neither the issuing nor the confirming bank has any obligation, and is not permitted to go behind the terms of the letter and the documents which are required to be

presented, and to enter controversies between the beneficiary and the party for whose account the letter was opened concerning any other agreements or transactions. Id. at 927. (Emphasis supplied.)

In short, the Bank in this case was not a surety and cannot claim as a surety that it is entitled on that account to escape its letter of credit liability by virtue of the settlement between the Association and Greenberg.

2. Furthermore, if the Bank were right in claiming that it was only a surety, then the trial below was a waste of time and should never have been held. The Bank could not have been liable if it were indeed only a surety until the Court first determined that Greenberg was liable. The Bank should have insisted that the case against Greenberg be tried first.

Instead, the parties went to trial on the Bank's liability under its letter of credit. That trial of the claim against the Bank was a practical way to simplify the

complex issues before the Court, and was based on a sound view of the law. All the parties were content with the proposition that the Bank could be liable on the letter of credit even if Greenberg had no enforceable obligation on the underlying sales contract. It is of no concern to the Bank whether the seller simply ignores the buyer or actually releases him, and the Bank accepted this view at the time. The Bank cannot claim now, at this late date, that it was only a surety and thus no longer obliged to live up to its obligations, solely because Greenberg settled his (after a judicial determination against the Bank).

Moreover, application to the present case of the rule of release urged by the Bank would not serve the purposes generally advanced for the rule in the context of suretyship. Here the customer has agreed that the Bank may have judgment against him for the amount the association collects from the Bank (R. 115). Thus, any right of subrogation by the Bank to

the claim of the Association against the customer is not impaired and the Bank's risk is not varied by the release. Nor is the purpose of the release frustrated by allowing the Bank to recover over against Greenberg. He has expressly agreed that the Bank may do so.

Application of the law of suretyship to letters of credit would serve only to impair the utility of documentary commercial letters of credit by subjecting them to technicalities reducing the very certainty of payment which such credits are designed to provide.

- B. Even if the Bank were a surety, it could not escape the judgment.

Even if the Court should adopt a general suretyship theory, this would not release the Bank on the facts of this case.

1. In the first place, if the release of the principal is made with the acquiescence or consent, express or implied, of the surety, the surety is estopped from disclaiming liability because of the release.

See Wyoming Construction Co. v. Western Casualty & Surety Co., 275 F.2d 97 (10th Cir.), cert. denied 362 U.S. 976 (1960); Trinity Universal Ins. Co. v. Gould, 258 F.2d 883 (10th Cir. 1958). Since the Bank's counsel was well aware of the impending arrangement and made no objection to it, the Bank may not now be heard to claim that Greenberg's release served also to release the Bank. See Sormanti v. Deacutis, 79 R.I. 361, 89 A.2d 191 (1952).

The mutual release by Greenberg and the Association was negotiated during the course of the trial of the Association's claim against the Bank. It was clearly predicated on Greenberg's insolvency and the consequent prospect of fruitless litigation of the remaining issues between Greenberg and the Association (R. 128). It was apparent, of course, that all issues relating to the Bank would be settled at the conclusion of the first trial. Though the Bank did not expect to be affected by it, the Bank's counsel was

fully apprised of the proposed arrangement--
as was the Court (R. 129).

At no time did the Bank object. At no time did it suggest that a dismissal or release of Greenberg might discharge the Bank. At no time did it request that the Bank be mentioned in any settlement. Counsel did nothing to disabuse the parties of the well-founded impression that a dismissal of the contest between the Association and Greenberg was wholly acceptable to the Bank. Thus, the Bank tacitly acquiesced in the arrangement, and must be deemed to have waived its right to object to it or to claim any right under it. It can hardly be heard to complain now (See R. 125) that the release and dismissal papers, as finally executed, made no mention of the Bank.

2. And there is yet another exception to the general suretyship rule which precludes the Bank from asserting the Greenberg release. A surety who has taken

security as indemnity against a possible loss from his undertaking is not released by the creditor's release of the principal.³ And the Bank had security--and abandoned it.

The "Agreement for Commercial Letter of Credit" (Ex. 21) between the Bank and Greenberg provided in part as follows:

"You [the Bank] are hereby given a specific claim and lien on all goods, and the proceeds thereof, which have been purchased under said credit ... with full power and authority to take possession and dispose of the same at your discretion We hereby authorize you to charge our [Greenberg's] account or accounts with you with any and all amounts that may, at any time or times, be owing from us to you hereunder.

* * *

"Any proceeds of said goods coming into the hands of UNITED STATES NATIONAL BANK OF OREGON are to be applied against any drafts or acceptances under this credit, or against any other indebtedness of ours to the bank, including all expenses incurred, commissions, and interest."

³ Jones v. Ward, 71 Wis 152, 36 NW 711 (1888); Stearns, Suretyship, Sec. 102 (2d ed. 1915)

The Bank was protected against loss on the Gardenia shipment by the "back-to-back" Schroder letter of credit. On the basis of the documents submitted by the Association, Schroder paid the Bank \$548,366.45, on August 26, 1966 (R. 72). From this amount the Bank deducted money Greenberg owed the Bank and turned the remaining \$473,000 over to Greenberg. The Bank thus had ample security. It allowed that security to evaporate (Tr. 107-108). Thus, even if the Bank were a surety--which we think it was not--it breached its "duty to the creditor to retain the security and in the event of the principal's default to utilize the security to satisfy the principal's duty to the creditor..." Restatement, Security § 140 (1941).

Any loss the Bank may sustain will occur, as the District Court found, as the result of the Bank's own "gross negligence" in August and September of 1966 (Tr. 310), and not as the result of the post-trial release.

he decision of the District Court insures that the letter of credit will serve its intended purpose of insulating the Association from Greenberg's insolvency. The Bank was paid for its promise to pay the Association. It was in turn protected by its agreement with Greenberg, and by the proceeds of the sugar. That it let those proceeds slip through its grasp is no fault of the Association. The Association has fulfilled the conditions of the letter of credit, and should now be paid by the Bank. The Bank--even if a surety, which we think it was not--should not be allowed to shift to the Association the consequences of the Bank's grossly negligent failure to enforce the provisions of its own contract with Greenberg.

C. The Greenberg settlement did not mitigate the Bank's Letter of Credit liability.

Alternatively, the Bank falls back on the theory that it is entitled to benefit from the post-trial settlement with Greenberg

even if it is not a surety. For this proposition it relies on ORS 75.1150(1).

This statute permits a beneficiary of a letter of credit to recover the face amount of a wrongfully dishonored draft "less any amount realized by resale or other use or disposition of the subject matter of the transaction." (Emphasis added) The statute thus refers to a situation where an issuer returns the subject matter of the sale to the seller--in this case, 5,000 tons of sugar. Of course, in these circumstances, the seller's claim on the letter of credit would be reduced by the proceeds of the resale of the sugar.

Here, however, the Association did not get the sugar back and did not resell it. Instead, the Bank accepted the Association's shipping documents, negotiated the documents to the eventual purchaser, received the full proceeds of over \$500,000, and neither returned the sugar nor paid the Association what was

ue under the Letter of Credit. The subject matter of the transaction--5,000 tons of sugar--passed to the eventual purchaser. It did not go back to the Association for "resale or other use." ORS 75.1150(1) does not apply.

The Bank apparently goes on to suggest, however, that the "subject matter" language of ORS 75.1150(1) should be stretched to include a supposed value received by the Association in settling its various controversies with Greenberg after the Bank had been held liable on the Gardenia letter of credit. This suggestion may be quickly disposed of.

The Association's complaint against Greenberg stated a variety of causes of action--breach of fiduciary duty arising out of long past transactions, violation of the Robinson-Patman Act, retention of the Association's profits on other sugar sales--as well as a claim for the Gardenia shipment; by the same token, Greenberg's claims against the Association had nothing to do with the Gardenia

transaction. The Association's complaint against the Bank, on the other hand, related only to the Gardenia letter of credit.

The Gardenia claim against the Bank was, of course, tried first. The Court held against the Bank. The Association therefore had a recovery from the Bank. It could not recover twice. At this point, then, the Association's claim against Greenberg for the Gardenia moneys was superseded.

Also at this point, Greenberg was judgment proof. On the afternoon of Friday, October 27, 1967, shortly after the trial between the Association and the Bank concluded with a decision in favor of the Association, counsel were advised by the Court Clerk that they should file by the following Monday the papers dismissing the issues not settled in the Bank case--that is to say, the outstanding non-Gardenia issues between the Association and Greenberg--or be prepared to go to trial on those issues (R. 130). The Association had

this point won its claim with respect to the Gardenia shipment. Further pursuit of Greenberg on the non-Gardenia claims would have been useless; he was insolvent. He was also not anxious to pursue his own claims against the Association. So the Association and Greenberg agreed to dismiss their claims and release each other. The Association's clear and single purpose in the settlement is shown by the letter transmitting the release of Greenberg, which states that the Association would set the release aside if Greenberg's deposition testimony as to his financial condition proved false (R. 132-133).

So it is obvious that the settlement had no practical significance to the Gardenia transaction; the Association had recovered practically all it claimed on the Gardenia transaction and the only remaining claims of consequence against Greenberg were unrelated. It is also obvious that, in fact, the Association received nothing of any value in the

Greenberg dismissal which the Bank is entitled to apply in mitigation of its own letter of credit liability.

In the absence of any compelling practical reason for giving the release the effect the Bank claims for it, the clear intent of the parties to the release should govern. Applying Oregon law in Rudick v. Pioneer Memorial Hospital, 296 F.2d 316 (9th Cir. 1961), the Ninth Circuit has held that the release of one party will operate to release another only if that was the manifest intent of the releasing party. In the instant case, the only parties mentioned in the release were Greenberg and the Association, and the only reason for the release was the avoidance of litigation which was doomed to futility because of Greenberg's insolvency. The language of the release, the already announced finding against the Bank and the undisputed purpose of the release hardly support a conclusion that the parties

tended to release anyone other than Greenberg from the Association's claims.

And finally, it is obvious that the Bank's plea comes too late. The Bank was fully advised of the proposal to avoid a useless trial with Greenberg. Its counsel attended the conference in chambers with the Court; it made protest, advanced no claim that it was deflected and did nothing to arrest the letter of credit trial which it now claims was superseded by that very settlement (R. 129-130). The Bank can hardly say now that it is relieved of its adjudicated liability for its own "gross negligence" on the Letter of Credit because of the post-trial settlement with Greenberg.

CONCLUSION

For the reasons set forth above,
the judgment of the District Court should be
affirmed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES NATIONAL BANK OF
OREGON, PORTLAND, OREGON,

Appellant,

v.

ASOCIACION de AZUCAREROS de
GUATEMALA 4a. Av. 14-53(1)
GUATEMALA CITY, GUATEMALA,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court
for the District of Oregon*

HONORABLE ROBERT C. BELLONI, Judge

FILED

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*Appeal from the United States District Court
for the District of Oregon*

HONORABLE ROBERT C. BELLONI, Judge

REPLY TO SUPPLEMENTARY STATEMENT OF FACTS

The Association in its Supplementary Statement of Facts attempts not only to supplement the Statement of Facts in the Appellant's brief, but also attempts to supplement the facts as contained in the record. The Association's brief is replete with statements of fact or factual conclusions without citation to or support in the record or transcript. We shall

point out only the more significant of the misstatements.

The Association implies that the Bank was the beneficiary of the Schroder back-to-back letter of credit, and that the Bank simply forwarded the Association's documents to Schroder (Appellee's Br. pp. 2-3). In fact, PSG was the beneficiary of the credit (Ex. 19), and the Bank merely acted on behalf of PSG (R. p. 72, par. 8). The documents forwarded to Schroder included a new commercial invoice drawn up by Greenberg (Tr. p. 89).

The Association's contention that the Bank's cable relating to the reduction of the first draft contained a misrepresentation is discussed in detail in the Argument portion of this brief.

The Association notes that the Bank failed to tell the Association that Schroder had already paid on the back-to-back letter of credit (Appellee's Br. pp. 3-4), thus implying that Greenberg had received full payment on the resale and that the sugar was fully satisfactory to the ultimate buyer. Payment on the Schroder letter of credit, however, was based upon documents, including the invoice drafted by Greenberg. The possibility of a claim against Greenberg by the ultimate buyer because of poor quality existed between August 26 and October 3 (R. pp. 61-62, Tr. p. 208).

The following statement in the Association's brief is without any citation to the record or transcript, nor can any such support be found:

“Greenberg was by then in dire financial straits—as the Bank well knew—and quickly used the Schroder money to pay other debts.

“Thus, by September 27, the proceeds from the sale of the sugar had been dissipated. The Bank was apparently intent on not paying the Association—even though it had received the shipping documents a month earlier—until it was certain it would be paid by Greenberg.” (Appellee’s Br. p. 5).

The Association states that its complaint alleged that Greenberg was “secondarily” liable for the purchase price of the GARDENIA shipment (Appellee’s Br. pp. 6-7). The complaint actually alleged that PSG, Greenberg and the Bank were “jointly and severally” liable (R. p. 5).

The paragraph which takes up almost the entire page nine of the Association’s brief, discussing the circumstances under which the release was given, is without a single citation to the record, nor is it supported by the record.

ARGUMENT

I

There was no evidence in the record to support the finding that the Bank’s cable of August 26 contained a false representation.

In seeking to sustain the court’s finding that the Bank’s cable of August 26, 1968 constituted a misrepresentation, the Association makes no contention

that the statement "POLARIZATION BELOW CREDIT REQUIREMENT" referred to anything other than the standard "basis 96° minimum polarization" fixed in the letter of credit itself. Moreover, the Association does not seek to contradict the clear evidence that the GARDENIA sugar polarized below 96°.¹

In view of the available evidence, and in the absence of argument by the Association, it must be concluded that the Association admits that the credit established a single standard of "96° minimum polarization." If the language of the credit is given its ordinary meaning, then the Association must admit that the GARDENIA sugar failed to meet the standard in the credit and that the cable did not constitute a misrepresentation.

The Association nevertheless seeks to sustain the trial court's finding of misrepresentation upon the theory that an alleged "trade usage" controls both the interpretation of the credit standard and the cable's reference thereto. The Association relies upon the testimony of its manager, John Bellamy, to the effect that within the sugar trade raw sugar is de-

¹ The record clearly establishes that the sugar polarized below 96°. On the date of the cable approximately one-third of the GARDENIA shipment had been tested and the tests disclosed that the sugar was polarizing between 93.3° and 95.7°, well below the 96° minimum fixed by the credit (Ex. 224). Final test results by three separate laboratories on 14 samples varied between 93.25° and 96.3°, with an average polarization of 95.176358° (Ex. 223, erroneously cited as Ex. "23" on page 31 of Appellant's opening brief). Only one of the samples tested at or above the "96° minimum polarization" fixed by the credit.

defined as sugar polarizing between 94° and 98° (Appellee's Br. pp. 12-14). Regulations established within the trade provide a system of premiums and penalties for sugar which polarizes above or below a 96° standard. In substance, the trade usage asserted by Mr. Bellamy is only a definition of raw sugar and a system of trade price adjustments which accommodate quality variations above or below the 96° base. Ninety-six degrees polarization remains the standard or "bench mark." If sugar fails to polarize at 96° , it does not meet the standard and is therefore subject to compensating price penalties. In this context, cable advice that sugar polarized below the credit requirement is perfectly consistent with the industry standard of 96° and in the case of the GARDENIA sugar was at all times a perfectly accurate statement.

The Association, however, attempts to give the asserted usage a wider application and argues that it properly understood the statement "POLARIZATION BELOW CREDIT REQUIREMENT [basis 96° minimum polarization]" to mean that the sugar polarized below 94° . The Association then reasons that, within the context of this particular usage of the term " 96° polarization," the Bank's cable constituted a misrepresentation. Even if the Association is correctly interpreting the trade usage, neither the Association's conclusion nor the court's finding can be sustained on the basis of such a usage.

While a particular trade usage such as that alleged here may be used to define the terms of an

agreement, or to give meaning to other manifestations of the parties' intentions, it is basic to the operation of such usage that the party to be bound know or have reason to know of the existence and nature of the usage. *Montgomery v. United States National Bank of Portland*, 220 Or. 553, 349 P.2d 464 (1960); *Barnard & Bunker v. Houser*, 68 Or. 240, 137 Pac. 227 (1913).²

The proper circumstances for application of special usage to determine the meaning of language are well summarized in Section 247 of the Restatement of Contracts:

"A usage is operative upon parties to a transaction where and only where

- (a) they manifest to each other an assent that the usage shall be operative, or
- (b) either party intends the effect of his words or other acts to be governed by the usage, and the other party knows or has reason to know this intention, or
- (c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage."

² The Association's brief cites *Fair Pavilions, Inc. v. First National City Bank*, 24 App. Div. 2d 109, 264 N.Y.S.2d 255 (1965), rev'd, 19 N.Y.2d 512, 281 N.Y.S.2d 23 (1967), in support of its contention that a letter of credit should be interpreted according to "trade usage." (Appellee's Br. p. 16). That case did not deal with the application of trade usage to letters of credit.

Comment b to Section 247 states:

“Accordingly one who seeks . . . to define language . . . must show either that the other party is actually aware of the usage, or that the existence of the usage in the business to which the transaction relates is so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it.”

The burden was on the Association to establish that the Bank knew or had reason to know of the usage of the sugar trade and that the Association was interpreting the Bank’s communications in accordance with that usage. Restatement, Contracts § 247, comment c (1932). Here the Association only offered the testimony of its own manager that within the sugar trade and its trade association 96° polarization meant a sliding scale from 94° to 98°, within which area variations in price are admittedly required. On trial, the Association did not contend nor did it offer evidence that the Bank dealt within the sugar trade or knew or agreed to the trade’s peculiar interpretation of the term “96° polarization.” Nor is there any evidence that the Bank knew or should have known that the Association would construe its cable advice of August 26 in terms of that peculiar usage.

Moreover, the trade meaning asserted by the Association is based upon only a part of the language of the credit requirement and totally disregards the credit’s use of the additional word “minimum.” Mr. Bellamy admitted that he excluded the word “minimum” found in the credit requirement and read its standard as “ba-

sis 96° polarization” rather than “basis 96° minimum polarization” (Tr. p. 218).

Even if it is assumed that the term 96° polarization has a trade meaning equivalent to 94° to 98° polarization, any confusion as to the standard fixed by the credit and the nature of the representation contained in the cable should have been obviated by the addition of the word “minimum” to the letter of credit standard. The word “minimum” under any accepted usage would establish a floor or base figure rather than the sliding scale asserted by Mr. Bellamy. The word “minimum” is defined in Webster’s Third New International Dictionary as “the smallest or least—the least quantity assignable, admissible or possible in a given case.” See also *Board of Education of Rockford v. Page*, 33 Ill.2d 372, 211 N.E.2d 361 (1965). Transposing this definition into the letter of credit, it is apparent that a standard of “[not less than] 96° polarization” is established. It is, moreover, apparent on the record that when effect is given to all terms of the credit standard, sugar polarizing at 95.176358° did not meet the 96° minimum standard imposed.

Since the trade usage asserted does not consider the actual terms of the standard fixed by the credit and since there was no evidence to establish Bank knowledge of the asserted usage, the cable is properly construed in accordance with the ordinary meaning of its language and so construed cannot be considered a misrepresentation.

Oregon law requires that a false representation

must be established by clear, satisfactory and convincing evidence, and cannot be presumed or assumed on the basis of doubtful evidence. *Miller v. Protrka*, 193 Or. 585, 238 P.2d 753 (1951). The Association has failed to meet this requirement.

II

The Bank's obligation to the Association was discharged or satisfied by virtue of the mutual release entered into by the Association, PSG and Greenberg.

A. A letter of credit involves a suretyship relation.

In its brief the Association managed to reach the conclusion that a letter of credit transaction does not involve a suretyship relation by redefining the term "suretyship" to accomplish its own purposes. The Association's brief states: "A surety, on the other hand, is not liable unless and until his principal is liable and defaults" (Appellee's Br. p. 20). Therefore, the Association concludes, a letter of credit transaction cannot involve a suretyship relation because: "The buyer's refusal to pay, or the seller's inability to collect from the buyer, is not a condition precedent to the issuer's liability" (Appellee's Br. 18-19).

The Association apparently confuses "suretyship" and "guaranty." A "guaranty," as the term is normally used, is a particular class of suretyship relation in which the surety is only liable upon the principal's default. Not all suretyship transactions, however, fall into the guaranty category.

In *Atterbury v. Carpenter*, 321 F.2d 921 (9th

Cir. 1963), cited in the Association's brief, the Court noted:

"The Oregon courts defer to both the Restatement [of Security] and Arant [on Suretyship] for the most accurate descriptions of these relationships." 321 F.2d at 924.

The Restatement of Security plainly states that a surety's liability need not be contingent upon non-performance of the principal:

"When the statement is made that the principal should perform, or that the principal has the principal or primary duty and the surety an accessorial or a secondary duty, it does not mean that the creditor's assertion of his right against the surety must be postponed until some action is taken against the principal. So far as the creditor is concerned, the surety may be the primary obligor. Where principal and surety are bound jointly, from the standpoint of the creditor there is no secondary liability." Restatement, Security § 82, comment f, at 229-30 (1941).

The Restatement notes that "a suretyship obligation conditioned upon the inability of the creditor to collect from the principal is usually called a guaranty of collection." Restatement, Security § 82, comment g, at 231 (1941). Not all sureties, however, fall into that category:

"The surety may be bound to the creditor on the maturity of the principal's obligation, on the principal's default, or only after certain attempts have been made to obtain payment from the principal." *Ibid.*

Arant on Suretyship notes the most significant distinction between a guarantor and other sureties:

“The outstanding and perhaps only important respect in which the guarantor’s undertaking differs from that of the surety is that it is expressly conditioned on the principal’s nonperformance of duty.” Arant, *Suretyship* 20 (1931).

The Association makes much of the fact that an issuing bank may not go beyond the documents and that the performance of the sales contract by seller is not a condition precedent to the issuing bank’s liability on the letter of credit. Although this may prevent the issuing bank from being a guarantor, the bank is still a surety in the broad sense. The parties have merely agreed that any defense the buyer may have as to the seller’s performance, not appearing on the face of the documents, will be a defense personal to the buyer and available only as between the buyer and the seller. See *Restatement, Security* § 108, comment d, at 285 (1941). The significant factor is that the seller is entitled to but one performance—if either the buyer or the issuing bank makes payment of the purchase price, the seller cannot collect from the other. It necessarily follows that if the seller releases the buyer in return for a *quid pro quo*, without reserving his rights against the issuing bank, the bank is discharged.

The Association contends that the suretyship rules with respect to release of the principal are not applicable here because the buyer had stipulated that the Bank could recover against him any amount the Bank

should be required to pay under the letter of credit. Yet, the surety's right of reimbursement from the principal is an essential feature of the suretyship relation. Absent the right of reimbursement, there is no suretyship relation.

In the present case, PSG and Greenberg had no choice but to stipulate to reimburse the Bank. The Bank's right to reimbursement was established in the contract between it and PSG (Ex. 21).

It is this right of reimbursement which gives rise to the rule that a release of the principal will release the surety absent an express reservation of rights against the surety. To hold otherwise would make the release meaningless because the creditor could proceed against the surety, who would then look to the principal. The courts will not imply such an intent unless it is expressly stated in the document of release. Moreover, to the extent which the principal has given consideration for the release, the creditor will have been paid twice and the principal's estate correspondingly reduced to the prejudice of the surety.

The Association also contends that to apply the law of suretyship would somehow impair the utility of documentary commercial letters of credit. It is difficult to understand, however, in what way the utility of letters of credit is impaired by requiring the seller, when releasing the buyer from any obligation on the sale, to expressly state any intended reservation of right against the issuing bank. This requirement is imposed not only within the suretyship relation, but

also upon any party dealing with persons who are jointly or jointly and severally liable to him, even if the liability is based upon contract. Restatement, Contracts § 120(2) (1933).

Likewise, there is no justifiable reason to fear that the seller in dealing with the buyer would discharge the issuing bank through modification of the sales contract. In the letter of credit the issuing bank consents to any change in the underlying sales contract which does not directly affect the requirements of the letter of credit. See Restatement, Security § 128, comment c, at 341 (1941). Moreover, the bank issuing a letter of credit is a compensated surety, and under the law of suretyship would not be discharged unless the modification materially increased its risk. Restatement, Security § 128(b) (1941).

B. The Bank being a surety, the Association's release of PSG and Greenberg, without reservation of rights against the Bank, discharged the Bank.

The Association asserts that if a release of the principal is given with the acquiescence or consent, express or implied, of the surety, the surety is not discharged (Appellee's Br. pp. 25-26). The Association then contends that the Bank was "fully apprised" of the proposed "arrangement" and "tacitly acquiesced" in it (Appellee's Br. pp. 26-27).

The Association is mistaken both as to the law and the facts. The court in *Trinity Universal Ins. Co.*

v. *Gould*, 258 F.2d 883 (10th Cir. 1958), cited in the Association's brief, stated:

"While the surety may waive the breach, mere knowledge of the breaching alterations does not amount to requisite consent, nor does knowledgeable silence give consent." 258 F.2d at 886.

To be charged with waiver, the court noted, the surety must knowingly engage in a course of action intended to deceive or mislead.

The opinion in *Pacific Nat. Agr. Credit Corp. v. Hagerman*, 39 N.M. 549, 51 P.2d 857, 860-61 (1935), collects many of the authorities holding that mere silence or passive conduct with knowledge of breach does not constitute acquiescence or consent by the surety. The annotation in 101 A.L.R. 1310 (1936) summarizes:

"The rule that a surety or indorser who merely remains silent on learning of facts which are grounds for his discharge from liability may thereafter assert his claim for release by reason of such facts appears to be established by the majority of the cases upon that point." 101 A.L.R. at 1311.

The Association's brief is also factually in error when it suggests that "the Bank's counsel was fully apprised of the proposed arrangement" (Appellee's Br. pp. 26-27). The Association's affidavit in opposition to the Bank's post-trial motion merely stated that the Bank's counsel was present when, during the course of the trial, "the court was advised that a settlement of the *remaining* issues between the Associa-

tion and Greenberg had been made" (R. p. 129) (Emphasis added). The "remaining issues" were the Association's other claims against PSG and Greenberg and the counterclaims. PSG had already admitted liability on the GARDENIA shipment; at the time of the Association's motion for summary judgment on the GARDENIA shipment, PSG suggested that the court enter an interlocutory summary adjudication of such liability, which could later be applied against PSG's counterclaims (R. p. 55).

Therefore, the Bank at most had knowledge that some settlement might be made of the other claims between the Association and PSG. Certainly there is nothing in the record to suggest that the Bank knew that the Association was planning to enter into a mutual release involving the GARDENIA shipment, with or without a reservation of rights against the Bank (R. p. 125).

The Association contends that a surety who has taken security as indemnity against a possible loss from his undertaking is not released by the creditor's release of the principal. Although the early cases so held on the theory that the indemnified surety occupied the position of principal, this theory was strongly criticized in Arant, *Suretyship* 186-87 (1931). The Restatement of Security, published in 1941, also rejected the earlier theory and established the rule that a release of the principal discharges the surety from his personal obligation, although the surety must turn over to the creditor any collateral which he is holding.

Restatement, Security § 122, comment c, at 323 (1941).

Simpson on Suretyship endorses the Restatement rule:

“The rule more in accord with logic and with the actualities of the situation is the Restatement rule, that the release of the principal discharges the surety from his personal obligation, but leaves him liable to account to the creditor for the security. So a surety who has returned the security to the principal *after knowledge that the principal has been released* would be liable to the creditor not on the debt but for the value of the collateral at the time of its return.” Simpson, Suretyship 306-07 (1950). (Emphasis added.)

Thus, the surety need account to the creditor only for the collateral on hand at the time the surety acquires knowledge that the principal has been released. As already noted, the Oregon courts follow the Restatement and Arant. *Atterbury v. Carpenter*, 321 F.2d 921, 922 (9th Cir. 1963).

The security relied upon by the Association is the general lien on proceeds of the sugar given to the Bank by PSG in the agreement for the issuance of the letter of credit (Ex. 21). The Bank received the proceeds on the Schroder credit on behalf of PSG around August 26, 1966, and deposited the funds to PSG's account (Tr. pp. 107-08). It is doubtful whether the Bank could have withheld the entire amount of the proceeds at that time, since the Association had not yet asserted the claims involved in this litigation.

Little, if any, of the proceeds remained in PSG's account at the time the release was executed. The Bank, however, is willing to turn over to the Association any security it was holding at the time it discovered the release, if the Court so decrees.

C. The mutual release constituted an agreed satisfaction of the purchase price in mitigation of the Bank's liability on the letter of credit.

The Association admits that it cannot recover twice on the GARDENIA shipment (Appellee's Br. p. 33). Obviously, the buyer's liability on the contract of sale would be reduced by any amount the issuing bank paid the seller under the letter of credit. Likewise, an issuing bank's liability to the seller for failure to honor drafts drawn on the letter of credit would be reduced or mitigated to the extent the buyer pays the seller on the purchase price of the sugar.

This common sense rule is codified in ORS 75.1150 (1), quoted on pages 23 and 24 of Appellant's open-brief, which provides that anything the seller realizes upon the disposition of the goods reduces the seller's damage from the failure to honor the drafts. Therefore, if the buyer elects to keep the goods and pays the seller for them, the seller has not been damaged.

In the present case, PSG (not the Bank, as implied in Appellee's Br. pp. 31-32) elected to keep the sugar and resell it to a New York buyer. It necessarily follows that the Association's damages were mitigated to the extent that PSG and Greenberg gave the Asso-

ciation consideration for the release of their liability to pay for the sugar.

The Association concludes that it received nothing of value for its release of PSG and Greenberg through a reasoning process based upon the assumption that the court's oral finding against the Bank discharged PSG and Greenberg. The Association stated in its brief:

"The *Gardenia* claim against the Bank was, of course, tried first. The Court held against the Bank. The Association therefore had a *recovery* from the Bank. It could not recover twice. At this point, then, the Association's claim against Greenberg for the *Gardenia* moneys was *super-seded.*" (Appellee's Br. 33). (Emphasis added).

The brief also states, "the Association had recovered practically all it claimed on the *Gardenia* transaction" (Appellee's Br. p. 34).

The Association, of course, cites no authority for the proposition that a verdict or judgment against the Bank would discharge PSG or Greenberg. The law is to the contrary. *Ford v. Schall*, 110 Or. 21, 27, 221 Pac. 1052, 222 Pac. 1094 (1924); *Sears v. McGrew*, 10 Or. 48 (1881).

The Association also contends that it received no value from the release because PSG and Greenberg were insolvent. Yet PSG and Greenberg had \$1,265,-423 in counterclaims against the Association from which they intended to satisfy their liability on the GARDENIA shipment (R. p. 55).

The Association states in its brief that the counterclaims were asserted “apparently only for defensive purposes” and that Greenberg “was also not anxious to pursue his own claims against the Association” (Appellee’s Br. pp. 9, 34). These statements are not supported by citations to the record; in fact, there is nothing in the record bearing on the merits of the counterclaims.

Greenberg’s financial condition no doubt was a major factor leading to the Association’s decision to enter into the mutual release. If the Association went to trial with PSG and Greenberg, the most it could hope to collect would be the \$250,135 secured by the letter of credit. On the other hand, if PSG succeeded in its counterclaims, the Association might well end up indebted to PSG and Greenberg for \$460,000 over the amount of its claims against PSG and Greenberg. Therefore, the Association, in effect, traded a \$250,000 receivable in exchange for a release of a potential \$1,265,000 liability. It is difficult to find any lack of value in such an agreement.

Finally, the Association argues that it never intended to give up its right to recover on the GARDENIA shipment. Since the trial court declined to hold a hearing on the motion, there is no evidence in the record as to Greenberg’s intent. If, however, the Association actually intended to exclude the GARDENIA transaction from the release, then the “gross negligence” which the Association constantly refers to in its brief existed on the part of the Association itself.

CONCLUSION

We respectfully urge that the judgment be reversed.

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